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SCOTCHER *v.* SCOTCHER.

1946
June 20, 24;
July 8.

Willmer J.

Divorce—Desertion—Refusal of sexual intercourse by respondent—General behaviour showing indifference to continuance of marriage—Whether amounting to desertion.

Refusal of sexual intercourse will not of itself constitute desertion, but refusal of sexual intercourse in conjunction with other circumstances may provide evidence from which an intention to desert may be inferred.

The parties were married in 1940 and by reason of the petitioner's war service no matrimonial home was ever established and they only cohabited during his leaves. Shortly after they were married, the respondent refused to have sexual intercourse with the petitioner, although on several occasions this refusal was followed by a contrite letter. During the petitioner's leave in October, 1942, she not only refused him sexual intercourse, but treated him with complete indifference, refusing to accompany him anywhere and saying she regretted having married him. The petitioner warned her that if she did not mend her ways he would leave her, and as her behaviour remained unchanged, he eventually left her and spent the rest of his leave elsewhere. The parties never cohabited again, and the respondent never attempted to communicate with him either before or during the time he was overseas. On his return from abroad,

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it was clear that the respondent intended to desert, but the petition was based on desertion dating from October, 1942:—

Held, that the conduct of the respondent as a whole, including her refusal of sexual intercourse showed such a reckless indifference whether the marriage continued or not, that an intention to desert, formed in October, 1942, and persisted in for three years preceding the presentation of the petition, must be presumed; and the petitioner was entitled to a decree nisi.

Weatherley v. *Weatherley* (1946) 62 T. L. R. 362, discussed and applied; dictum of Hill J. in *Jackson* v. *Jackson* [1924] P. 19, followed.

HUSBAND'S PETITION FOR DIVORCE on the ground of desertion.

The facts, as stated by Willmer J. in his judgment, were as follows: The parties were married on July 9, 1940. At that time, and at all material times subsequent thereto, the petitioner was serving with the Royal Naval Volunteer Reserve. The marriage was duly consummated, but by reason of the petitioner's war service the parties never lived and cohabited together except for brief periods of leave. No matrimonial home was established, his leaves being spent, for the most part, at the house of the respondent's parents. In the summer of 1941 the petitioner, coming on leave, found that the respondent was taking an undue interest in another man. In October, 1941, in consequence of certain information obtained from relatives about the behaviour of the respondent, the petitioner obtained compassionate leave. He met the respondent and another man, and taxed them with seeing too much of each other. He was assured, however, that there was no impropriety in the association, and although he asserted that his wife did not behave towards him in a wifely manner, he accepted their assurance. On return to duty the petitioner received an affectionate letter from the respondent again, in effect, assuring him that there was nothing in the association, and expressing regret for what had occurred.

The petitioner spent his Christmas leave with the respondent and on this occasion she treated him almost as a stranger and for the first time refused him intercourse. This was followed by a contrite letter from the respondent, written in February, 1942, expressing regret for the way in which she had treated the petitioner, and asking for forgiveness and a second chance. The petitioner did not regard this as a sincere letter and he refused to spend his next leave in April, 1942, with the respondent, but went to stay with his own parents instead. The

respondent raised no protest at the time but early in May she wrote to the petitioner again asking for forgiveness, and saying : " All I want is you to come back to me and take up " life together again."

The petitioner was ill during the summer of 1942, and he had no further leave until September, but then he was prepared to take the respondent at her word and again went to spend his leave with her at her home. On this occasion, according to the petitioner, she behaved more pleasantly to him, but she again refused him intercourse. After this leave the petitioner had to go back to hospital and remained there for some weeks. During this period he received two letters from the respondent. They were confined to trivialities and did not suggest that at this time the respondent felt she had anything particular for which to apologize. Both were written in affectionate terms, the respondent expressed the hope that the petitioner would soon be fit again, and said that she was looking forward to seeing him again soon.

After discharge from hospital in October, 1942, the petitioner went back to the respondent for his sick leave, which in fact, proved to be his final leave with her, and the crucial period for the determination whether the respondent deserted at that date. On this occasion the respondent's old aversion to him had returned, and she not only refused him intercourse but behaved in an unusually cold and off-hand manner ; she said that she regretted ever having married him. She refused to go about with him, or to go with him to visit mutual friends, she left it to her mother to look after him (except when the latter was absent on A.R.P. duty, when he had to look after himself), and generally displayed no interest in his presence. When challenged about her refusal of sexual intercourse she denied that there was any other man, and gave no reason except a general disinclination. The petitioner formed the conclusion that it was a wilful refusal. Eventually he threatened that if she did not mend her ways he would go away and leave her. She expressed no concern at this threat, made no appeal to him to stay, and generally remained completely off-hand with him. In due course, the petitioner carried out his threat, and went to spend the rest of his sick leave with his own parents. The respondent knew where he had gone, and could have found him, but she made no attempt to communicate with him or to get him to come back. The parties never cohabited after that, and the

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petition was based on the allegation that in those circumstances the respondent deserted the petitioner in October, 1942.

The petitioner continued to serve in this country till February 1943, and until then the respondent knew where he was, and had every opportunity of communicating with him. He had made it clear to her that he was prepared to return to her, if she would mend her ways and behave as a wife should behave, particularly in the matter of sexual intercourse. The respondent, however, made no attempt to communicate with him, and while matters were still in this state the petitioner was sent overseas. While overseas he heard nothing from the respondent. Upon his return to this country in May, 1944, he telephoned to her, with a view to ascertaining whether it would be possible for them to start again. As a result the respondent, on May 9, 1944, wrote him a letter in the following terms: "Scotch, I was surprised to hear your voice on the telephone "yesterday and since then have been doing some hard thinking. "I don't want to see you so if there is anything you want to "discuss with me would you get in touch with my solicitor . . . "Mary."

Roland Adams for the petitioner. On the petitioner's evidence (which the respondent has not come forward to deny) the respondent was not willing to accept the duties and responsibilities of married life. From October, 1941, her behaviour showed she had no real intention of upholding the marriage. Her letters were not sincere, they were wholly inconsistent with her behaviour when she was with the petitioner. When he spent a leave away from her, she made no protest. During his leave in October, 1942, she not only refused him sexual intercourse, but would not accompany him anywhere and said she regretted having married him. When the petitioner threatened to leave her, if she did not mend her ways, she was completely indifferent. Although the animus deserendi did not fructify till October, 1942, there were indications earlier. When the petitioner returned from overseas in May, 1944, he was quite prepared to resume cohabitation but the respondent refused point blank. However, the court must find desertion as from October, 1942. During that leave the respondent displayed an intention to break up the marriage, or at any rate a reckless indifference whether the marriage continued or not. The effect is the same in law. The respondent was guilty of desertion within the dictum of Sir Francis Jeune in *Synge* v.

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Synge (1), when he said, in the case of a woman refusing her husband sexual intercourse and petitioning the court for restitution of conjugal rights, that it was rather the wife who was the deserter. The Court of Appeal expressed no opinion on this point, but this dictum has never been challenged since that case, over forty years ago ; there has been no case since really similar to *Synge* v. *Synge* (1). *Beevor* v. *Beevor* (2) is distinguishable, as in that case Henn-Collins J. held that the wife's refusal was due to an invincible repugnance beyond her control, but that was not the case with the respondent, her refusal was obviously wilful. *Jackson* v. *Jackson* (3) and *Weatherley* v. *Weatherley* (4) lay down that mere refusal of sexual intercourse will not of itself constitute desertion, but those cases are on a different footing as the parties had not separated ; in this case there had been no co-habitation for over three years. In *Jackson* v. *Jackson* (3), Hill J. said that refusal of sexual intercourse coupled with other circumstances might afford evidence of an intention to desert. If the allegation were cruelty, there would clearly be constructive desertion (*Boyd* v. *Boyd* (5)), but there may be constructive desertion, even where the evidence against the guilty party falls short of desertion, the question is which party intended to terminate the marriage.

Cur. adv. vult.

July 8. WILLMER J. This case arises out of a petition by a husband for the dissolution of his marriage on the ground of the alleged desertion of his wife. I have taken time to consider my judgment, because it appeared to me that the questions raised involved consideration of some of the basic principles governing the law of desertion. The case was undefended and I have, therefore, not had the advantage of hearing evidence from both sides but, having seen and heard the petitioner in the witness box, I came to the conclusion that he was a truthful witness, and I am prepared to accept as substantially accurate his account of the facts.

[Having stated the facts his Lordship continued :] I think there can be no doubt that this letter of May 9, 1944, furnishes the clearest possible evidence of an intention on the part of the respondent to desert at that date, but this is not sufficient for

(1) [1900] P. 180 ; [1901] P. 317.
(2) (1945) 109 J. P. 241.
(3) [1924] P. 19, 27.
(4) (1946) 62 T. L. R. 362.
(5) [1938] 4 All E. R. 181.

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the petitioner, because the necessary period of three years did not elapse between May, 1944, and the date of presentation of the petition. Before the petitioner can succeed it is necessary that I should be satisfied that the respondent was in desertion at least as early as the occasion of the petitioner's sick leave in October, 1942.

The authority principally relied upon for the petitioner was the case of *Synge* v. *Synge* (1). In that case it was decided by Sir Francis Jeune, P. in a wife's suit for restitution, that a wife, who without cause refuses to permit marital intercourse to her husband, cannot allege desertion without reasonable cause by him if in consequence he refuses to live with her. That decision was affirmed by the Court of Appeal and has, so far as I am aware, stood unchallenged for the last forty-five years. Having regard to that decision I think it is clear that, had it been the wife in this case alleging desertion by her husband on the ground of his refusal to live with her in the circumstances, such a claim would inevitably have failed, and it would have been impossible to hold that the husband was a deserter. Sir Francis Jeune, however, having decided that in such circumstances the husband was not guilty of desertion, went on to express the opinion that rather it was the wife who deserted him. This expression of opinion was not necessary for the decision of the case, and the Court of Appeal expressly refrained from deciding the point. No subsequent case, so far as I am aware, has raised exactly the same point, and the dictum of Sir Francis Jeune remains only a dictum—certainly one that is entitled to be treated with the highest degree of respect in this court—but, nevertheless, a dictum never in fact acted upon but never expressly disapproved.

Since the date of the decision in *Synge* v. *Synge* (1) there have been certain other cases before the court to which I must refer, in which the effect of refusal of sexual intercourse has been considered in relation to charges of desertion. In the case of *Jackson* v. *Jackson* (2), it was held by a divisional court, consisting of Sir Henry Duke P., as he then was, and Hill J., that mere refusal or abandonment of sexual intercourse while the parties continued to abide under the same roof is not desertion. It must be emphasized that in that case the parties continued living together, and this was the underlying fact which formed the basis of the decision. This is made clear in the judgment of the learned President, where he says: "The

(1) [1900] P. 180; [1901] P. 317. (2) [1924] P. 19, 22.

" underlying material fact with regard to it is that during the " whole period these parties were living together, though with " differences between them, and perhaps breaches of duty on " one side or the other. It seems to me that it would be a " false pretence to make a judicial finding that one of these " parties had in point of fact deserted the other at any time " which is in question in this case." Having dealt with the case of *Powell* v. *Powell* (1), the learned President again stresses this point when he says : " That case throws no light at all on " this case where the parties at all material times were living " together, and where the wife went in the first instance from the " joint matrimonial home to try to maintain before the " magistrates that her husband had deserted and was living " separate and apart from her." It is obvious, therefore, that *Jackson* v. *Jackson* (2) is not this case, since in this case the parties have undoubtedly been living separate for over three years, but it has to be considered whether, having regard to the manner in which the separation in this case was brought about in October, 1942, the difference in the facts is such as to make the case distinguishable in principle.

In *Weatherley* v. *Weatherley* (3), which was recently before the Court of Appeal, the facts were much more similar to those of the present case. In that case, as in this, the husband was at all material times on war service, so that cohabitation was necessarily restricted to intermittent periods of leave. The marriage took place in May, 1941, and was duly consummated. The husband had leave about once a month and cohabited with his wife, but in November, 1941, the wife refused him sexual intercourse. He continued spending his leaves with her until November, 1942, no further intercourse taking place. In June, 1943, he took her to a restaurant, and seized the opportunity of asking her to resume normal married life, but she refused, and from that time onwards he gave up the attempt and did not return to her. On February 22, 1945, he presented a petition alleging desertion as from November, 1941, that is the date from which intercourse was first refused. The petition was dismissed by Bucknill J., as he then was, on the authority of *Jackson* v. *Jackson* (4), and the petitioner appealed. The case was fully argued in the Court of Appeal, with the assistance of counsel for the King's Proctor, and ended in a disagreement. Scott L.J., was of the opinion that the refusal of intercourse

(1) [1922] P. 278.
(2) [1924] P. 19, 22.
(3) 62 T. L. R. 362.
(4) [1924] P. 19.

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was such a fundamental repudiation of the obligations of marriage that it could justifiably be regarded as desertion. The majority, however, consisting of Tucker L.J. and Evershed J., decided that the wilful and unjustifiable refusal of intercourse by one spouse is not by itself sufficient to constitute desertion, and in reaching this conclusion both expressed themselves to be in agreement with the decision in *Jackson* v. *Jackson* (1), which they thought must be deemed to have been in the contemplation of the legislature at the time of the passing of the Matrimonial Causes Act, 1937. By this decision I am, of course, bound, unless on the facts it is distinguishable.

There is one other decision which I should mention, if only to distinguish it. I refer to *Beevor* v. *Beevor* (2). In that case, the parties were married in 1923, and in 1925 a child was born. Thereafter the wife persistently refused to have sexual intercourse with her husband. They lived together till 1940 when, in consequence of the wife's persistent refusal, the husband left her. After three years had elapsed the husband petitioned for dissolution, and the wife by her cross-prayer alleged that he had deserted her. Henn-Collins J. who tried the case, found as a fact that the wife's refusal was due not to selfishness or fear of conception but to an invincible repugnance or inhibition beyond her control. On this basis he held that the case was the same as if the wife by some accident or disease had been rendered incapable of intercourse. Since that would afford the husband no excuse for leaving her, he held that equally the invincible repugnance of the wife afforded no excuse. Consequently the husband, and not the wife, was guilty of desertion.

In the present case the husband's evidence is that the refusal of the wife was wilful. The case has not been defended, and the wife has not seen fit to come to the court to deny this assertion. There is no evidence, therefore, on which I should be justified in treating this as a case where the refusal was caused by the wife's invincible repugnance—on the contrary I feel bound to approach it as a case of wilful refusal. I do not think, therefore, that any guidance is to be obtained, for the decision of this case, from what was said in *Beevor* v. *Beevor* (2).

It is obvious that I cannot decide this case in favour of the petitioner unless on the facts it is distinguishable from *Jackson* v. *Jackson* (3), and *Weatherley* v. *Weatherley* (4). Counsel for the petitioner argues that it is distinguishable on two grounds.

(1) [1924] P. 19.
(2) 109 J.P. 241.
(3) [1924] P. 19, 27.
(4) 62 T. L. R. 362, 365.

In the first place it is said that in this case the parties have been physically apart for a period exceeding three years, whereas in *Jackson* v. *Jackson* (1), they were at all times living under the same roof, and in *Weatherley* v. *Weatherley* (2) they had been apart for something less than the three years. But the parting in this case was brought about by the petitioner's own voluntary act, and if it was prompted solely by the respondent's refusal of intercourse and nothing more, I do not see how the case is distinguishable in principle from one in which the parties remain together. If the mere refusal of intercourse is not desertion, on what principle does it become desertion when the offended party elects to go instead of staying under the same roof? Moreover, it seems to me that I am precluded by authority from holding that the departure of the petitioner in this case makes any difference.

In *Weatherley* v. *Weatherley* (2) Tucker L.J., having based his judgment on *Jackson* v. *Jackson* (1), goes on in the last paragraph of his judgment, to add these words: "I would add that, "if I am wrong in the conclusion at which I have arrived, "I think that, the desertion could, in any event, only date "from the time when the matrimonial home was in fact "disrupted by the husband's departure, and cannot be "ante-dated to the first refusal of sexual intercourse by "the wife." This would have been an additional ground for withholding relief in *Weatherley's* case (2), but it is not to be taken that the learned lord justice is there deciding that three years separation, following refusal of intercourse, is of itself necessarily enough to afford grounds for relief. On the contrary, seeing that the passage cited begins with the words: "If I am wrong in the conclusion at which I have "arrived," it seems clear that the actual decision of the learned lord justice was based on the broader grounds stated earlier in his judgment—namely, that mere refusal of intercourse, whether or not it leads to separation, is not of itself enough to constitute desertion. The point propounded in the last paragraph of the judgment could not be a good one if he was right in the earlier part of the judgment. In my judgment the ratio decidendi of the majority of the court in *Weatherley* v. *Weatherley* (2), is against this contention of the petitioner.

The second ground on which it is sought to distinguish this case from *Jackson* v. *Jackson* (1) and *Weatherley* v. *Weatherley* (2), is that, whereas in those two cases there was no

(1) [1924] P. 19, 27. (2) 62 T. L. R. 362, 365.

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complaint against the respondent spouse except the wilful refusal of sexual intercourse, the petitioner in this case has a number of other complaints against the conduct of the respondent. According to the petitioner's evidence, which I have said I accept, she was completely off-hand in her manner towards him during the critical period in October, 1942, she neglected to look after him, and stated candidly that she regretted having married him. When he threatened to leave if she did not mend her ways she remained unconcerned, and when he did go, though she knew where he had gone, she made no effort to get him back, or even to communicate with him. During the succeeding eighteen months she denied him even the common courtesy of writing to him. It is argued that these are all circumstances which, coupled with the refusal of sexual intercourse, amount in sum to such a disregard of the fundamental obligations of the married state as to afford convincing evidence of an intention on the part of the respondent to break up the marriage, that is, to desert.

I think that the judgment of Hill J. in *Jackson* v. *Jackson* (1) may be taken as authority for the proposition that refusal of sexual intercourse, though insufficient by itself to constitute desertion, may in conjunction with other circumstances provide evidence from which an intention to desert may be inferred. This is what Hill J. says: "Refusal to occupy the "same bed and refusal to have sexual intercourse may be a "fact which, taken with other facts, has weight in considering "whether the husband has really caused the wife to live apart. "I say may be, because even so, in my view, the refusal of "sexual intercourse would have to be considered in connexion "with the age of the parties, the state of their health, the "number of children they already had, and a number of other "circumstances. It may be a circumstance which ought to "be taken into account, but at the best it is only a circum-"stance which may be taken into account along with others, "and in my view it would be entirely wrong to suppose that, "taken by itself and independent of anything else, it would "ever be possible to base upon it a finding of desertion."

So far as I can trace, nothing was said by the majority of the Court of Appeal in *Weatherley* v. *Weatherley* (2) to throw doubt upon this part of the judgment of Hill J., which, indeed, seems to be plainly a correct statement of principle. If this is right, it appears to me that in the long run the question which I

(1) [1924] P. 19, 27. (2) 62 T. L. R. 362.

have to decide in this case is one of fact, namely, whether the conduct of the respondent, taken as a whole, including her refusal of sexual intercourse, constituted such a total disregard of the fundamental obligations of matrimony as to afford evidence of an intention to desert. As was pointed out by counsel for the petitioner, the respondent must be taken to intend the natural and probable consequences of her acts, and if she behaves with a reckless indifference to the natural and probable (and, I may add, expressly threatened) consequences of her conduct, this would be sufficient evidence of an intention to desert.

It seems to me that in order to decide what was the real state of mind of the respondent I must weigh the outward manifestations of her conduct, as described by the petitioner, against what she herself has said in her letters at the material time. I must ask myself whether a spouse, who had the intention of breaking up the marriage, or who was recklessly indifferent as to whether she broke it up or not, would have written the letters that are before me—particularly the two letters of September, 1942—which appear to be written in contemplation of the continuance of the marriage and with pleasurable anticipation of the next reunion. On the whole, I have come to the conclusion, having regard to the convincing evidence given by the petitioner, that the respondent was a person whose fair words belied her true state of mind, and I do not think that what she said to her husband on paper, in his absence, can be taken as a fair indication of her regard for him when present in the flesh. In spite of what is said in these letters it seems to me that this marriage broke down because of the conduct of the respondent, and I think her conduct, viewed as a whole, was such that I can only infer an intention to desert on her part. I find that that intention was formed in October, 1942, and persisted for a period of more than three years immediately preceding the presentation of the petition. For these reasons my judgment is that the petitioner is entitled to the relief which he seeks and there will be a decree accordingly.

Decree nisi granted.

Solicitors for the petitioner: *Jaques & Co.*

I. G. R. M.

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Feb. 11, 13;
Mar. 6;
May 22.

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CROSLAND *v.* CROSLAND.

Divorce—Decree absolute—Intervention—Intervener appearing after decree pronounced but before filed—Decree valid and binding when pronounced in court.

When once a decree absolute has been pronounced by the judge in court it is effective and binding, whether or not it has been signed by the registrar or filed in the registry, such acts being merely ministerial and having no relation to the validity of the decree or its immediate effectiveness at the time of its pronouncement. *Semble* where a petitioner has obtained a decree absolute without disclosing that he has committed adultery, in respect of which the court would not have granted a decree unless there had been an application to exercise its discretion, the court has no power to alter it at the instance of a member of the public or the King's Proctor, such a right of appeal being confined to the parties concerned.

APPLICATION to rescind a decree absolute.

On February 11, 1946, a decree absolute was pronounced in favour of the petitioner following the usual procedure after the grant of a decree nisi. After the decree had been pronounced by the judge but before it was filed in the Divorce Registry, the intervener appeared and alleged that the decree should not be made absolute on the ground that the petitioner had committed adultery with the intervener's wife during the six months which elapsed after the date of the decree nisi, which fact was admitted by the petitioner. The intervener alleged that before the decree was signed by the registrar or filed in the Divorce Registry, he had appeared to show cause why it should not be made absolute. The judge found as a fact that he had appeared before the decree was filed but not before it was signed.

N. Faulks and *Anthony Gordon* for the intervener. The real question in this case is at what stage does a decree absolute become final? Although the judge had pronounced the decree absolute, it had not become binding and effective, as before it was signed by the registrar and filed in the registry, the intervener appeared to show cause why it should not be

made absolute; the ground of his intervention being that the petitioner had committed adultery with his wife within six months of the decree nisi, which was admitted by the petitioner. A decree absolute does not become binding and effective until it is both signed by the registrar and filed in the registry. There is no direct authority on this point, but it is well settled that a High Court judge has power to alter an order before it is drawn up. It was said in *In re Suffield and Watts, Ex parte Brown* (1) that so long as an order has not been perfected, the judge has power of reconsidering the matter; but when once an order has been perfected, the jurisdiction of the judge has come to an end. In *Millensteed* v. *Grosvenor House (Park Lane), Ld.* (2) it was held that an order made by a judge could be varied at any time until it was "perfected" and that an order was not perfected until it had been passed and entered. This is equally true of a judgment in the Chancery Division: *In re Nazaire* (3) and of a judgment of the Companies' Court: *In re Crown Bank* (4). It is submitted that on the same principle a decree absolute is not "perfected" until it has been both signed by the registrar and filed in the registry, both of these acts being essential parts to a decree absolute. Rule 34 of the Matrimonial Causes Rules, 1944, provides that the registrar shall draw and sign every decree of the court, and the rules appear to envisage that until this is done a decree has not been made absolute, in which case this intervention is within the time specified by s. 183, sub-s. 2, of the Supreme Court of Judicature (Consolidation) Act, 1925, namely, after the decree nisi and before the decree absolute.

Colin Duncan for the King's Proctor. A decree absolute becomes effective when pronounced by the judge. There is no further process for perfecting the decree as there is for perfecting certain other judgments. It is a judgment in rem, not only a judgment in personam. [He referred to rules 40 and 81 of the Matrimonial Causes Rules, 1944, and to s. 31, sub-s. 1, and s. 183, sub-s. 2, of the Supreme Court of Judicature (Consolidation) Act, 1925; and to the following cases: *In re Nazaire* (3); *In re Suffield and Watts, Ex parte Brown* (1); *Preston Banking Co.* v. *William Allsup & Sons* (5); and *Millensteed* v. *Grosvenor House (Park Lane), Ld.* (2).]

(1) (1888) 20 Q. B. D. 693.
(2) [1937] 1 K. B. 717.
(3) (1879) 12 Ch. D. 88.
(4) (1890) 44 Ch. D. 634.
(5) [1895] 1 Ch. 141.

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As to procedure, r. 38 of the Matrimonial Causes Rules deals with interventions by persons other than the King's Proctor, r. 37 applies to interventions by the King's Proctor only. A private person having launched an intervention, cannot shift the burden to the King's Proctor. The King's Proctor acts under the directions of the Attorney-General (s. 183 of the Act of 1925); a judge has no power to direct the King's Proctor to intervene, *Guest* v. *Guest and Blaylock* (1).

F. S. Laskey and *R. Ormrod* for the petitioner. As soon as the judge has pronounced a decree absolute in court, he is functus officio. Such cases as *Millensteed* v. *Grosvenor House* (*Park Lane*), *Ld.* (2); *In re St. Nazaire* (3) and *In re Suffield and Watts, Ex parte Brown* (4) are not applicable. It may be that a judgment in the King's Bench Division or the Chancery Division is not final until it is formally drawn up, but this has no relation to a decree of the Divorce Division. Further, judgments in the King's Bench and the Chancery Division have no effect as regards status and a decree absolute has such an effect. The rules relating to one division cannot in the absence of express authority, be adapted to another division. As soon as a decree is pronounced, it is binding on the parties and a petitioner is free to remarry, and if an intervener could appear at this stage and ask for the decree to be set aside, the petitioner would be in danger of committing bigamy. There is no authority on this point and the rules are not particularly clear, but r. 40, sub-r. 2, of the Matrimonial Causes Rules, 1944, provides that a time shall be appointed for a decree absolute to be pronounced in open court in the Probate Division in London, which appears to support the view that the pronouncement of the decree by the judge makes it binding and effective forthwith.

Bush James K.C. and the *Hon. Victor Russell* for the respondent supported the argument that when once the decree absolute was pronounced in court the judge was functus officio.

WALLINGTON J. The question before me is whether, in the circumstances of this case as disclosed in the affidavits, and having regard to the arguments presented to the court, the

(1) Unreported; Feb. 2, 1946.
(2) [1937] 1 K. B. 717.
(3) 12 Ch. D. 88.
(4) 20 Q. B. D. 693.

decree absolute in this case, which I pronounced by my lips on February 11, 1946, is a final and effective decree, or whether any further steps were necessary in order to give it permanent and effective validity. What happened was that the petitioner, through his solicitors, had performed the usual functions leading to an application for a decree absolute, and had given the usual certificate, at the requisite time, leading to the putting of this case into the next list of cases for decree absolute. The case was in fact put into the next list and, with a large number of other cases, came before me on February 11, at the sitting of the court. The usual procedure was then adopted and I pronounced the decrees absolute.

[Having stated the facts his Lordship continued :] A great many authorities have been cited to me and have proved very useful. They relate to a number of cases in which there were questions as to the effectiveness of judgments in the Probate Division, the King's Bench Division, the Chancery Division, the Bankruptcy Court, the Companies Court, and so on, until certain things may have happened to them subsequently to the actual pronouncement of the order by the lips of the judge in court. I have given full attention to all those authorities, and the result is that, in my opinion, they do not affect the question before me, which resolves itself ultimately into one point, namely, whether the filing of the document recording the decree is essential to the validity of the pronouncement of the decree. I am quite satisfied, on the authorities, that when the judge in court has with his lips pronounced a decree absolute, there is an end of the matter, and that the steps which are taken subsequently to that pronouncement are merely ministerial acts which have no relation to the validity of the decree or to its immediate effectiveness at the time of its pronouncement. I need not go further into the authorities. I have formed that view without any hesitation, despite anything I may have said during the course of counsel's address on behalf of the intervener.

But there is another aspect of the matter which it may be not inconvenient to mention. I am not making a finding—I have not the materials on which to find, and it would be beyond my present jurisdiction to deal with it ;—but it may be that in this case or in other cases there has been a concealment of the fact that the petitioner applying for a decree absolute

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has committed adultery which he or she knows, or ought to know, would bar his or her right to a decree absolute, in the absence of an application to the court to exercise discretion in his or her favour, as the case may be, and in the absence also of an order of the court exercising discretion, and there does not seem to be any method at present existing by which circumstances of that sort can be dealt with. The result, which seems to be unfortunate in the public interest, is that even though there may have been fraudulent concealment of vital facts throughout the whole of the proceedings of a petition, down to the very moment of the pronouncement of the decree absolute, when once the decree absolute has been pronounced the court is helpless ; and the right of appeal is a limited right and is not open, in my view, to a member of the public. That is a right which is confined to the parties in the proceeding. The public interest may be very gravely prejudiced if these things are done ; and there is no assurance that they are not done.

I want to make it quite plain that I am not finding any fraud in this case ; but I want to point out that there are no means, in the circumstances I have outlined, for the public or any member of the public, or even I think the King's Proctor, to attack a decree absolute once it has been pronounced, whether it has been recorded and filed or not, even though it may afterwards be plain that there has been dishonesty on the part of the petitioner in any part, or even the whole, of the proceedings from the moment of the filing of the petition. I, therefore, must dismiss this intervention.

Application dismissed.

Solicitors for the petitioner : *Aukin Courts & Co.*

Solicitors for the respondent : *Tarlo, Lyons & Co.*

Solicitors for the intervener : *Lawrence Dennis & Co.; The King's Proctor.*

I. G. R. M.

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Nov. 27, 28, 29; *Dec.* 6.

Lord Merriman P.

THE SADO MARU.

Prize — Cargo — Outbreak of war with Germany during voyage — Contraband of war—Seized from Japanese ship while neutral—Proceeds of sale—Subsequent outbreak of war with Japan—Freight payable to enemy shipowner on delivery of cargo at destinations—Condemnation of freight to the Crown as prize—Claim on behalf of controller enemy assets for compensation in lieu of freight.

In 1941, while Japan was still a neutral power, the Japanese steamship *Sado Maru* was diverted and searched by the Royal Navy and certain portions of her cargo were seized as contraband of war. The ship herself was released and proceeded on her voyage by reason of her then innocent national character. Some ten consignments of the cargo seized destined for Hamburg and a small consignment destined for Rotterdam had been shipped before the outbreak of war with Germany in 1939. The freight on these was payable on delivery at the ports of destination. The cargo was sold by the Marshal and the proceeds remained in his hands. Japan became a belligerent enemy in Decemer, 1941. On November 19, 1942, the proceeds of the sale were condemned as lawful prize to the Crown, and, subsequently, a portion of the proceeds from the Rotterdam consignment was released by the Procurator General to persons entitled, the sum of 67*l.* 8*s.* 4*d.* representing the freight which would have been payable to the Japanese agents in Rotterdam being retained by the Marshal. The Crown sought a decree of condemnation in respect of that sum together with the amount of freight which would have been similarly payable to the Japanese agents in respect of the Hamburg consignments, an aggregate sum of 2,267*l.* 3*s.* 10*d.* The controller of the assets of the London branch of the Japanese company, an official appointed by the Board of Trade, claimed this sum as compensation in lieu of freight which normally would have been receivable by the Japanese on the ground that the cargo was shipped before the war with Germany in a ship which was neutral at the time of the shipment, and of the seizure; and that the proceeds had not been condemned as prize when Japan became an enemy.

Held, with regard both to the released and the condemned proceeds, that although the original seizure of the cargo was not hostile, there was an implied condition that, in the event of the shipowner becoming an enemy, the right to freight or compensation in lieu thereof would be condemnable as prize. The aggregate sum was, therefore, condemnable to the Crown and the claimant was not entitled to any sum in respect of compensation.

The Fortuna (1809) Edw. 56 referred to.

CLAIM arising out of the application by the Procurator-General on behalf of the Crown for a decree of condemnation.

The claimant, James Charteris Burleigh, controller of the

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London branch of the Nippon Yusen Kabusiki Kaisya, an official appointed by the Board of Trade, claimed the sum of 2,267*l.* 3*s.* 10*d.*, as compensation in lieu of freight which would have been earned by the Japanese steamship *Sado Maru* if the ship delivered certain consignments of cargo at Hamburg and a certain consignment at Rotterdam. The ship was, in fact, stopped during the war by the Royal Navy and the cargo in question seized and eventually condemned as prize.

The facts are fully set out in the judgment.

A. J. Hodgson for the claimant. I ask for an order for the payment of certain sums due to the claimant as compensation in lieu of freight and charges which would have been payable to the Japanese company if they had remained neutral. Mr. Nesbitt has submitted on behalf of the Procurator-General certain contentions and I will wait until he has developed them before giving my answers.

J. V. Nesbitt for the Crown. I submit that the authorities establish that where a ship, or goods, or freight, belonging to a neutral power has been seized and detained, and that neutral afterwards becomes at war, then the goods, freight, etc., as a matter of course, becomes condemnable and cannot therefore be recovered by anyone. It is true to say that if Japan had remained neutral compensation in lieu of freight would have been payable out of the proceeds of the cargo in question here. Assuming that your Lordship is against me on that contention and that the Crown is not entitled to this money, my second contention is that these sums are not an asset of the London branch of the Japanese shipowners and, therefore, cannot be recovered by the claimant.

[Counsel referred to the treatise on Prize Droits by H. C. Rothery, Registrar of the High Court of Admiralty, 1853–1878.] Sub-section 11 at p. 69 is headed "Capture at sea "before embargo and before orders to detain," and reads: "Thus, suppose this country be at war with some other state, "and one of our cruisers to have captured a vessel under the "neutral flag on the ground either of her being enemies' "property or of her having enemies' property on board. "Proceedings are commenced in the Court of Admiralty, and "if the neutral owner succeeds in establishing his title to the "property, it is at once restored to him. Supposing however, "that, whilst the property was still under adjudication, or even "after it had been restored but before it had quitted this country

" an embargo had issued against the State to which the property " belonged, it would have been immediately seized by the civil " officers of the Crown, and if war had ensued, would have been " condemned as a droit to the Crown."

At pp. 76 and 77 (sub-s. 13) Mr. Rothery sets out what the legal rights were where the prize was in possession at the time of the issue of the embargo and he refers to the *Elenora Charlotta* (1805) and the *Sophia Amelia* (1805) : " Both vessels " had been seized on the suspicion of their having enemies' " property on board and of being engaged on an illegal voyage. " Proceedings having been commenced against them in the " Court of Admiralty, both the ships were restored but some " doubts being entertained as to the ownership of the cargoes, " which had been claimed as Prussian property, the question " in regard thereto was reserved. Ultimately these doubts " were removed, and the cargoes would as a matter of course " have been restored to their owners, but in the meantime war " had broken out with Prussia. The result of which was that " they were ' condemned as prize to His Majesty, being Prussian " ' property taken prior to hostilities '."

[The President : Things seized before war can be adjudicated as prize.]

The embargo of former times and the detention of the present day are on the same footing. The freight in question here was in the custody of the court, for the proceeds of sale of the cargo is still in court. Counsel referred to the *Fortuna* (1) and read the judgment of Sir William Scott.

[The President : That is a clear statement as to how embargo operates on outbreak of war.]

A. J. Hodgson. There is an important distinction to be drawn between freight and compensation in lieu of freight. Whatever the intention of the Crown was at the time of the seizure towards the contraband cargo there was never any intention so far as the Japanese shipowners were concerned whether the cargo was returned or withheld that there would not be payment of compensation out of the proceeds.

[The President : Do you not think that there ought to be added the words " rebus sic stantibus " to that statement of the Crown's intention quoad the Japanese shipowners ?]

I am not prepared to argue affirmatively what the intention of the Crown as to the contraband cargo may have been ; the Crown intended that the Japanese should be paid compen-

(1) (1809) Edw. 56.

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sation in lieu of freight whether Japan became subsequently an enemy or not. The retention of the proceeds of sale in court was not, vis-à-vis the claim for compensation, of a direct hostile character. Property which, belonging to a neutral who subsequently becomes an enemy, is brought into this country falls into one of three classes: (1.) Property affected by an Order in Council; (2.) Property detained in the country under an embargo; and (3.) property which has been detained under direct hostile character of the original seizure. There never has been hostile seizure of freight. At the time of the detention of these goods there was no hostile intention by the Crown against either ship or freight. Otherwise the point whether these sums constitute an asset of the London branch does not arise.

Cur. adv. vult.

Dec. 6. LORD MERRIMAN P. read the following judgment: In this case the Crown seeks condemnation of the freight on ten consignments laden on board the Japanese ship *Sado Maru*, amounting to 2,267*l.* 3*s.* 10*d.* James Charteris Burleigh, the controller of the London branch of the Nippon Yusen Kabusiki Kaisya, the Japanese shipowners, has entered a claim for this freight on the ground that it would have been recovered and received by the said branch after the goods had been carried to their destination. Strictly speaking, the claim is for compensation in lieu of freight, which was payable in terms of the bills of lading on delivery at Hamburg or Rotterdam, as the case might be. The claim is based on the fact that this was an ordinary commercial shipment made before the outbreak of the recent war in Europe, and that, although that war had broken out when the ship herself was diverted and searched by the Royal Navy and the goods in question seized in prize, the ship herself was not detained, but was promptly released as belonging to neutral owners and being herself innocent.

The goods were condemned in prize on November 19, 1942, as being contraband with an enemy destination, and therefore not protected by the Declaration of Paris, 1856, with the exception of a consignment of fatty acid which was the only parcel destined for Rotterdam and not Hamburg. This parcel, or rather the proceeds, for all these goods had in fact been sold and were represented in the hands of the Marshal by the proceeds, had been released to the claimants who had satisfied

the Procurator-General of their title, but the sum of 67*l.* 8*s.* 4*d.* in respect of the freight thereon was retained by the Marshal for whom it might concern. Meanwhile, in December, 1941, Japan had become an enemy. It was expressly conceded, on behalf of the claimant, that no distinction need be drawn between the freight in respect of the cargo released, and that in respect of the cargoes condemned. The first question, therefore, is whether the Crown is entitled to condemnation of so much of the proceeds of these goods in the hands of the Marshal as represents freight. The second question is whether, in any event, the present claimant, representing the London branch of the Japanese company, has any claim to these moneys. It has not been thought necessary to pursue the second question, which, if the Crown is entitled to a decree of condemnation, inevitably becomes academic. Accordingly, I have not been invited to read the affidavits or to investigate the documents on which the claim of the London branch, as such, is based.

The first question is of general importance. The claimant by his counsel, has made it clear that his only anxiety is to discharge his duty as the Controller appointed by the Board of Trade under the Trading with the Enemy Act, 1939, and to assist the court in coming to a just decision, so that under s. 3A, sub-s. 3, of that Act, he may eventually make a proper distribution of the assets of the London branch. That duty has been faithfully performed by Mr. Hodgson, and I am greatly indebted to both counsel for their assistance.

The basis on which the Crown rests the claim for condemnation was stated by Mr. Nesbitt as follows : He admitted that if Japan had remained neutral, compensation in lieu of freight would have been payable in respect of the consignments in question, whether they were condemned or released, on the principle recognized in the *Fortuna* (1) the *Prosper* (2), and the *Juno* (3), that, it being solely due to the incapacity of the cargo that the shipowner was prevented from effecting an entire execution of the contract of carriage, while he had done his utmost to carry it to its consummation, it was inequitable that the incapacity of the cargo should operate to the disadvantage of the ship. He submitted, however, that because Japan subsequently became a belligerent, the freight, being still in this country in the hands of the Marshal, thereupon became liable to condemnation as good and lawful prize, as

(1) (1809) Edw. 56.
(2) (1809) Edw. 72.
(3) [1916] P. 169.

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would the ship herself have been if she had not, in fact, proceeded on her voyage before Japan became a belligerent. I was told that this is a test case, possibly decisive of many similar cases. Accordingly, although I entertained no doubt in the course of the argument what my decision must be, I thought it advisable to put it into proper form.

Mr. Hodgson did not dispute that it is well settled prize law that, in certain circumstances, property in the hands of the Marshal, including the right to receive freight or compensation in lieu thereof (which, to avoid circumlocution, I will hereafter refer to simply as freight), is liable to condemnation on the outbreak of hostilities if it belongs to an enemy subject. But he contended that this liability depends on the original seizure having a hostile character in relation to the particular property. The simplest illustration of a hostile seizure was, he submitted, the prohibition by order in council during a period of embargo in anticipation of actual hostilities, such as occurred during the Napoleonic wars, of the restoration by the court to the owners, potentially belligerent, of ships or freight, or of the departure of the ships themselves. In the present case, so he contended, the seizure was directed against the cargo, and there was no hostile intention against the freight due to the admittedly innocent shipowners, and it was a mere accident that the cargoes or their proceeds had not been condemned and the freight restored to the shipowners thereout, before Japan became a belligerent. This contention makes it necessary to examine some of the authorities on which Mr. Nesbitt relied. I have derived great advantage from a consideration of a treatise on prize droits in the form of a " Report to the Treasury on Droits " of the Crown, and of Admiralty in Time of War," presented to the Treasury during the Crimean War by Mr. H. C. Rothery who was Registrar of the High Court of Admiralty from 1853 to 1878. The treatise was revised and annotated in 1915 by Mr. E. S. Roscoe, the Admiralty Registrar during the war of 1914–1918. The object of this treatise was to afford guidance to the Treasury in regard to the distribution of the proceeds of Droits, but it sets out, incidentally, the grounds of condemnation out of which these Droits arose. This is its value for the present purpose, a value which is enhanced by the fact that it records the grants actually made to captors out of what would now be called the prize fund. Moreover, this treatise was referred to with marked approval by Sir Samuel Evans in the *Roumanian* (1).

(1) [1915] P. 26, 48.

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I propose to begin with two cases, the *Prosper* (1) and the *Fortuna* (2), referred to on p. 86 of Mr. Rothery's treatise. I should say in passing that the reference to the *Fortuna* in the footnote is inaccurate ; the report in Edwards obviously refers to a later voyage of this ship. To appreciate the full significance of these two cases for the present purpose, it is necessary to bear in mind the following dates collected from pp. 20 and 21 of the treatise and the report of the *Prosper* (1). Both vessles were Danish ; both were seized in 1807 on suspicion of carrying enemy property ; and both were restored. The dates of seizure and release in the case of the *Fortuna* were July 13 and 27 respectively. In the case of the *Prosper* the dates do not appear. In each case, however, the question of the cargoes and freight had not been adjudicated at the time of the release of the ships. On September 2, 1807, an Order in Council was made placing an embargo on Danish property, and on September 10, as appears from the *Prosper*, an Order in Council directed the payment of all freight due to Danish subjects into the Admiralty Court. On November 4, war was declared with Denmark, and on December 18, the cargo in the *Fortuna* was condemned as lawful prize to the captors on payment of freight ; but the freight, which, as Mr. Rothery observes " was in the cargo but " which belonged to the Danish owner of the ship," was condemned to the Crown as Danish property captured before hostilities. In the case of the *Prosper* (1), the cargo was proved to be Portuguese property and was ultimately restored as such. Nevertheless, it was restored subject to the payment of freight to the Crown, as succeeding to the rights of the enemy shippers, notwithstanding that the right to receive freight was a chose in action which the Danish shipowner was not in a position to enforce. It will be seen, therefore, that in each of these cases, though the ship herself had been restored, in the case of the *Fortuna* (2) certainly before either the embargo or the outbreak of hostilities, the freight was treated as still being in the hands of the Marshal by virtue of the cargo in each case being still under adjudication, and became vested in the Crown by reason of the outbreak of hostilities, although in one case the cargo was condemned, and in the other it was restored.

Another case, the *Trende Sodskende*, also on p. 86 of Mr. Rothery's treatise, illustrates the same point. In this case the vessel had been decreed to be restored. She had not left this country at the time of the embargo and was accordingly

(1) Edw. 72. (2) Edw. 56.

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re-seized and ultimately condemned to the Crown as Danish property captured before hostilities. Meanwhile, the adjudication of the cargo had been in suspense, but it was subsequently condemned to the captors as enemy property, but the freight thereon was condemned to the Crown as Danish property captured before hostilities. The record of the grant made to the captors is extremely illuminating. They got nothing in respect of the ship, because she had been restored and afterwards re-seized to His Majesty's use, but "as the freight was "not dependent on the ship, but was a thing reserved in "judgment on the goods," ultimately condemned to the captors, the captors seemed to be entitled, so the King's Proctor reported, to a grant of one-fifth of the freight. It is only necessary to add that the *Prosper* (1) was referred to with approval in the *Prins Knud* (2). It is worthy of note in passing that the preface to 6 Christopher Robinson sets out a list of cases under appeal to the Privy Council, where the vessels were condemned as enemy property on the breaking out of the Prussian hostilities. In one case at least, that of the *Twee Gebroeders* (3), the Crown was appealing against a decree of restoration. I do not think that it is necessary to multiply examples. I will refer only to one other, the *Constantia Harlessen* (4). This, like the case of the *Trende Sodskende*, was a case in which the ship, before she was divested of her neutral character, had been captured and brought to Yarmouth, and freight was decreed to the Danish Master by a prize court. But before the departure of the vessel the Danish hostilities broke out, and the ship was again seized and condemned to the Crown. Earlier in the voyage the cargo owners had advanced money on bottomry for certain necessary repairs to enable the voyage to proceed. In the circumstances this proved to be an advance against freight and not the subject of average. Accordingly, Lord Stowell held that, although bottomry bonds, generally speaking, are disallowed as the subject of a claim in prize, nevertheless, the owners of the ship and cargo being entitled to set off against each other all deductions arising out of the immediate transaction, the Crown was obliged to accept the condemnation of the freight subject to the right of the cargo owners to deduct the amount of the bottomry advances. In this case, although it is not expressly so stated, there appears to be no question of the cargo being liable to condemnation, seeing that the cargo

(1) Edw. 72.
(2) [1942] A. C. 667, 684.
(3) (1800) 3 C. Rob. 162.
(4) (1810) Edw. 232.

owners were reimbursed their advances; yet the Crown was entitled to condemnation of the freight subject to the reimbursement of advances, though the freight had originally been decreed to the Danish Master, while he was still a neutral.

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The result, in my opinion, is that there is no foundation for imposing a condition that the original seizure of the freight itself, or of the goods in which the freight lies, must have been of a hostile character. But even if liability to condemnation on the subsequent outbreak of hostilities did depend on the intention at the time of seizure, I should still be of opinion that the seizure, although devoid of hostile intention in the first instance towards the particular subject matter, as distinct from the rest of the property seized, would be subject to the implied condition that the intention might become hostile if the owner of the property became a belligerent enemy while the property itself remained in the custody of the Marshal.

I hold that the sums in question are condemnable to the Crown as good and lawful prize. The Procurator-General does not ask for costs. The decree of condemnation, therefore, will be without costs.

Claim disallowed.

Solicitor for the Crown: *The Procurator-General.*
Solicitors for the claimant: *Simmons & Simmons.*

Applied. SIMPSON *v.* SIMPSON. [1951] 1 All E.R. 955.

Applied. LANE *v.* LANE [1952] P. 34

H. G.

Dicta of LORD GREENE, M.R., at p. 30, *applied.* EDWARDS *v.* EDWARDS. [1949] 2 All E.R. 145.

Followed. EDWARDS *v.* EDWARDS [1950] P. 8

Referred to. LANE *v.* LANE [1951] P. 284

Applied. SIMPSON *v.* SIMPSON [1951] P. 320

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Divorce — Constructive desertion — Conduct amounting to.

Where a spouse who has left the matrimonial home seeks to establish that the other spouse has been guilty of constructive desertion, the conduct relied upon need not necessarily amount to a matrimonial offence, but must be of a grave and convincing character. As in actual desertion, so in constructive desertion it is necessary to prove both factum and animus—acts amounting to expulsion in fact, of such a serious character that an intention to disrupt the marriage can reasonably be inferred having regard, inter alia, to the principle that a person is presumed to intend the natural and probable consequences of his acts. The use of expressions such as "If you do not like it, you can go away and "live elsewhere," is not necessarily sufficient to justify the inference of an intention to disrupt the marriage.

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Per VAISEY J. It is seldom that conduct relied on as constructive desertion will amount to a matrimonial offence, for if it did, the petition would be based on that offence, and there would be no need to rely on constructive desertion.

APPEAL from Wallington J.

The facts are fully dealt with in detail by Lord Greene M.R. in his judgment and may be briefly summarized as follows.

The parties were married in 1928. On his father's death in 1932, the husband went to manage his father's farm. From that time onwards he formed a very close and intimate friendship with a pig-man on the farm named Harris, and constantly associated with him ; he brought him to the house as a visitor, and would leave other guests in order to seek his society. When the wife was away, he had Harris to sleep in the house (the husband accounted for this by the fact that after his war-service he had, for a considerable time, been subject to epilepsy, and thought it wise to have someone in the house in case of need). He also frequently took Harris for holidays or to entertainments in preference to his wife. There was, as both Wallington J. and the Court of Appeal expressly found, no homosexual or improper element in this friendship, though such an element might have been suspected even by persons not of prurient mind.

The wife strongly objected to this friendship, and sought to break it up, but without success. She alleged that it put her in an intolerably humiliating position, and made them a laughing-stock in the village. In reply to her remonstrances the husband told her that " if she did not like it, she could clear out, and go " and live with her mother." She left the matrimonial home on April 1, 1941. The husband made no attempt to induce her to return, and on October 7, 1942, she wrote to the husband saying that she did not intend to return.

The wife petitioned for divorce on the ground of the husband's desertion, alleging that his conduct had driven her out and amounted to " constructive desertion." The husband denied desertion, and cross-petitioned on the ground of the wife's desertion, which she denied.

Wallington J. held (1) that the husband was guilty of constructive desertion, since he knew that if he continued his association with Harris it would bring the marriage to an end, and he must be presumed to have intended the natural conse-

(1) [1946] W. N. 152.

quences of his acts. He granted the wife a decree, and dismissed the husband's petition. The husband appealed.

Sir Valentine Holmes K.C. and *Harold Brown* for the husband. We accept Wallington J.'s ruling that the crucial date is October 7, 1942, on which date the wife wrote the letter saying that she did not intend to return. Thereby she was prima facie guilty of desertion, and the husband could have started proceedings for restitution of conjugal rights. Under the ecclesiastical law a deserted spouse was entitled to such a decree as of right, and there was no answer to it unless the deserting spouse showed "just cause"—which meant a matrimonial offence by the other party. The right to a decree was made statutory by the Matrimonial Causes Act, 1857. The Matrimonial Causes Act, 1884, made failure to comply with a decree of restitution of conjugal rights desertion and a ground for judicial separation. That was repealed and re-enacted by s. 185 of the Judicature (Consolidation) Act, 1925. Section 5 of the Matrimonial Causes Act, 1937, amended that section. Nothing less than a matrimonial offence—adultery or cruelty—by the petitioner could amount to just cause till in *Russell* v. *Russell* (1) it was held that because the Act of 1884, s. 5 made the decree permissive, the courts had a discretion, and something less than a matrimonial offence could amount to just cause. They referred to *Oldroyd* v. *Oldroyd* (2); *Beer* v. *Beer* (3); *Fletcher* v. *Fletcher* (4); *Greene* v. *Greene* (5); *Fisk* v. *Fisk* (6). [LORD GREENE M.R. In *Beer* v. *Beer* (3) the husband had left the wife on the ground of her persistent drunkenness. Could he not have treated it as a case of constructive desertion?] Not unless the wife's conduct amounted to legal cruelty.

[LORD GREENE M.R. Do you say that you cannot have just cause unless the conduct of the other party is such as to amount to constructive desertion?] Yes: it seems clear from the cases cited that to justify a refusal of a decree of restitution of conjugal rights, something approaching legal cruelty must have been proved. *G.* v. *G.* (7) is the only case where a decree has been refused on grounds other than cruelty or apprehension of violence. If this husband had brought a petition for resti-

(1) [1895] P. 315.
(2) [1896] P. 175, 183.
(3) (1906) 22 T. L. R. 338.
(4) (1915) 31 T. L. R. 306.
(5) [1916] P. 188.
(6) (1920) 36 T. L. R. 248.
(7) [1930] P. 72.

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tution of conjugal rights in 1942 the wife would have had no answer. If that be so, she could not affirmatively have set up desertion.

Beyfus K.C. and *Leslie Brooks* for the wife. As soon as one gets conduct by the husband of such a kind as to disrupt the matrimonial home, that is enough to enable the wife to say: "This is a condition of things which no wife should be asked to "endure." It is a sufficient answer to a petition for restitution of conjugal rights to prove an unreasonable refusal of intercourse. They referred to *Davis* v. *Davis* (1); *Scotcher* v. *Scotcher* (2). Before *Weatherley* v. *Weatherley* (3) one could have submitted that the matter of unreasonable refusal ought to be submitted to the jury. Whether that case was a binding decision, or whether the opinions expressed in it were only dicta, might require consideration. In that case there had not been a cessation of cohabitation for three years.

There was no dispute as to principle, there must admittedly be such conduct as would, in the case of normal people, disrupt the home—gross humiliation of one spouse by the other would suffice. It was not possible to lay down an objective standard, because the same conduct might affect different wives differently. For instance, if the wife was allergic to cats, an insistence by the husband on keeping them might amount to conduct sufficient to break up the home, while to a wife not so affected it might be a mere trifle. They cited *Dickinson* v. *Dickinson* (4).

Cur. adv. vult.

January 24, 1947. The following judgments were read.

LORD GREENE M.R. In these consolidated suits in which each of the parties was asking for a decree of divorce on the ground of desertion by the other for the statutory period, Wallington J. granted a decree to the wife and rejected the prayer of the husband's petition. The desertion of which the judge found the husband guilty was what is known as "constructive" desertion. The wife left the matrimonial home on April 1, 1941. The circumstances relating to her departure might, as the judge thought, be treated as to some extent equivocal and with the concurrence of both sides he treated October 7, 1942, as the crucial date, that being the

(1) [1918] P. 85.
(2) Ante p. 1.
(3) (1946) 62 T. L. R. 362.
(4) (1889) 62 L. T. 330.

date of a letter to her husband in which she said "I have "decided after a great deal of thought during a very long time "now that I am not returning home." After his wife left him on April 1, 1941, the husband never made any attempt to induce her to return to him, and apparently had no desire even to discuss the matter. As the judge very naturally confessed, the case was one which gave him considerable anxiety and from time to time his mind wavered and fluctuated. He felt oppressed by the fact that it was the first case of the kind in the books, for he was, as he said, confronted with a set of circumstances without precedent. It is manifest, therefore, that this appeal demands, as it has received, the most careful consideration.

Now that desertion for the statutory period of three years is by itself a ground for divorce, that particular matrimonial offence has assumed a greater practical importance than it had before. Where the desertion alleged is constructive desertion, it is particularly important to see that the circumstances necessary to constitute that offence are present before the final step of dissolving the marriage is taken by the court. It would, I venture to think, be unfortunate if, under the guise of alleged constructive desertion, a new cause for divorce should imperceptibly creep into our law. See the language of Lord Merriman P. in *Leng* v. *Leng* (1). Incompatibility of temperament or unhappiness in the marital relationship which is not caused by cruelty are not, by themselves, grounds of divorce : nor by themselves do they entitle the spouse affected to leave the matrimonial home and then to claim that the other spouse, even if he or she is alone to blame for the ill-success of the marriage, has been guilty of the grave matrimonial offence of desertion. It is as necessary in cases of constructive desertion as it is in cases of actual desertion to prove both the factum and the animus on the part of the spouse charged with the offence of desertion. The practical difference between the two cases lies in the difference in the circumstances which will constitute such proof. In actual desertion the spouse charged must be shown to have abandoned the matrimonial consortium in fact, and to have done so with the intention of deserting. In constructive desertion the spouse charged must be shown to have been guilty of conduct equivalent to "driving the other "spouse away" (per Bucknill J. in *Boyd* v. *Boyd* (2)) from the matrimonial home and to have done so with the intention of

(1) (1946) 62 T. L. R. 722. (2) (1938) 55 T. L. R. 3.

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bringing the matrimonial consortium to an end. In each case the intention may, of course, be inferred if the circumstances are such as to justify the inference. In the case of actual desertion the mere act of one spouse in leaving the matrimonial home will in general make the inference an easy one. In the case of constructive desertion where there is no such significant act as a departure by the spouse who is alleged to be in desertion, the acts alleged to be equivalent to an expulsion of the complaining spouse must be of such gravity and so clearly established that they can fairly be so described. If they do not satisfy this test, not only is expulsion in fact not proved but it is not legitimate to infer an intention to desert. A man may wish that his wife will leave him: but such a wish, unless accompanied by conduct which the court can properly regard as equivalent to expulsion in fact, can have no effect whatever. Conversely, where the conduct of the required nature is established, the necessary intention is readily inferred since no one can be heard to say that he did not intend the natural and probable consequences of his acts: (*Sickert* v. *Sickert* (1)). The crucial matter for consideration therefore is the nature of the conduct relied upon as equivalent to an expulsion of the complaining spouse.

It must, I think, be accepted that the acts sufficient to satisfy this test must be of a serious and convincing nature. Sir Valentine Holmes on behalf of the husband submitted that nothing short of a matrimonial offence such as cruelty or adultery would suffice and he pointed out that even in the case of adultery some more flagrant conduct beyond the mere commission of adultery had always been present in the reported cases. But he eventually found himself compelled to agree that conduct short of an actual matrimonial offence might be sufficient. In this I agree with him. But the necessary conduct must, from the very nature of the offence of desertion, obviously be of a grave and convincing character. Whether in any given case this requirement is fulfilled is, I think, a question of fact upon which a jury would require to be carefully directed. It would be for the judge to say whether the facts were capable of being regarded as equivalent to an expulsion from the matrimonial home.

I now turn to the facts of this case. There is no suggestion of cruelty or of any other matrimonial offence. The wife's case is based entirely on the allegation that the husband's

(1) [1899] P. 278.

association with a man in his service named Harris was conducted in such a manner and with such lack of consideration for the wife's feelings as to cause her unhappiness and a sense of humiliation over a period of years. In her own words the marriage "gradually deteriorated until there was no marriage "whatsoever." I may quote the following passage from the evidence-in-chief: "(Q.) You said the change came gradually. "What was the cause of the change? (A.) This being thrown "into the company of this man Harris, and this extraordinary "schwärmerei—I think it is the word—that he had developed "for him. (Q.) That is a German word?—(A.) Yes. It means "a sort of 'crush,' I think. That is the only way to explain it. "(Q.) This was a gradual change? This did not all happen "at once?—(A.) Yes, it was gradual." The marriage took place on June 14, 1928. On the death of his father on January 1, 1932, the husband gave up his business in London and became manager for his mother of his late father's farm near Reigate. Harris "about whom," as the judge said, "the whole of the "difficulty in this married life had arisen" had been engaged by the father shortly before his death as pigman, and he continued in that employment under the husband's management. Later he was promoted to the position of bailiff. Not long after the death of the father the husband began to form a friendship with Harris which developed into a very close and remarkable association. In order to understand it something must be said about the two men themselves.

The husband had been seriously wounded in the head in the 1914–18 war. As a result, he had suffered from epilepsy, and doubts appear to have been entertained whether he should marry at all, although his wife was unaware of this. He had been compelled to take regular doses of luminol and bromide. By the year 1935 his epileptic attacks were, as Dr. Riddock said in his evidence, largely under control and he was able to give up the luminol, but he was still taking bromide. By this time the only symptoms of an epileptic character from which he suffered were occasional fits of giddiness and obscuration of vision—described by Dr. Riddock as "really "mild epileptic attacks"—which were of short duration and did not in practice cause him any real inconvenience. That he suffered from these fits is, I think, quite clearly established, but his wife was not aware of this, no doubt due to the fact that he was admittedly a courageous man who would not complain. These fits, moreover, in no way prevented him from engaging

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in sports and other activities requiring great physical effort and powers of endurance. In the year 1937 the spouses suffered a grave misfortune due, as the doctor thought, to the bromide which the husband had been taking for years. He became impotent. On January 10, 1938, accompanied by his wife he went to consult Dr. Riddock, the consultant in whose hands he had been since 1925 in connexion with the results of his head injury. Dr. Riddock advised him to reduce the doses of bromide. This he did, but he had to start taking it again, since (as he said) he began to suffer from a dull pain in the side of his head, a certain amount of giddiness and a singing in the ear. He never recovered his capacity. It is clear that at this period his wife was not regarding the marriage as having ceased to exist in any sense. She was evidently and naturally interested in the restoration of his capacity. She did not, it is true, complain. But it is, to say the least of it, extremely probable that this vital change in the relationship of the spouses did destroy a bond which might, to some extent, have saved their affection for one another and prevented the shipwreck of their marriage. It was in 1939 that, according to her evidence, she decided to leave him. As between husband and wife such a misfortune is a very grave one, and I can well understand that consciously or unconsciously it imposed an additional strain on the relationship of these spouses. The learned judge, however, does not appear to me to attribute sufficient importance to it. I do not myself think it safe to disregard the emotional change which this unfortunate event must have caused and in weighing the allegations made by the wife as to the husband's treatment of her, the circumstance that all possibility of marital intercourse between them had been destroyed for some four years before she actually left him must be taken into account.

Harris was in 1932 a man of about thirty-one or thirty-two years old, several years younger than the husband. He was married and lived with his wife and child in a cottage near the farm. I quote from the judgment " it is common ground that " Harris was a very hard worker, apparently a very honest " fellow who devoted himself to his job and never took any " sort of holiday unless the husband took him away for a " holiday." These were the two men who formed a close and growing friendship. As the judge found, the friendship was a perfectly clean one and there was no foundation for any suggestion that the relationship was of a homosexual or other

degrading character. Before us Mr. Beyfus, for the wife, not only accepted the finding, but strenuously disclaimed having made any such suggestion at any time in the course of the case. This disclaimer, of course, I accept. He did, however, make a great point of the suggestion that people would inevitably think that the relationship between the two men was a homosexual one, and, as will appear, the judge accepted this suggestion and it formed one of the main grounds of his decision. The manner in which the suggestion was brought into the case may be illustrated by the following passage in the cross-examination of the husband by Mr. Beyfus: " (Q.) Do not " you think everybody in the neighbourhood would be wonder- " ing whether this was not a homosexual association?— " (A.) It never entered my head. (Q.) It never entered your " head?—(A.) No. (Q.) Did you know quite recently in a law " case the present slang meaning of the word ' Pansy ' has " been discussed?—(A.) Yes. (Q.) Do you know what a " ' Pansy ' means in modern slang?—(A.) Yes. (Q.) Do not " you think that vast quantities of the neighbours would be " thinking of you as a couple of ' Pansies,' whether you were, " or not?—(A.) No, I do not think so." One may perhaps wonder to what extent a man should allow his actions to be affected by scandalous gossip of this kind—if indeed, it existed in the present case. The judge's view seems to have been that the husband ought to have given way to it and abandoned the friendship.

There is nothing in the evidence to suggest that, at any rate on the side of the husband this friendship was other than a genuine and deep-rooted attachment. The wife, however, ascribed the friendship on her husband's side to the fact that he was very easily flattered. As regards Harris, although the wife did throw out a suggestion that he was a " schemer " concerned only with the material benefits which the relationship conferred upon him, there is no other evidence to this effect and the suggestion—surely an unworthy one in the case of a " very " honest fellow "—can, I think, only be ascribed to the strong dislike which the wife felt for Harris and his association with her husband. The friendship was no doubt an unusual one, in the sense that the two parties to it differed so widely in regard to class and education. But to treat this circumstance as in any way affecting the sincerity of the friendship or the value which the husband, at any rate, attached to it is, as it appears to me, to give an entirely wrong colour to the situation.

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The wife regarded the friendship as "unnecessary." Things which the husband did with or for Harris were, in her view, "unnecessary." The judge went so far as to say that, if the husband had had any real sense of his duties to his wife, he would have given up this friendship with Harris "which was "not vital to him in any business or social sense," when he realized that it was distressing her. Some people might think this to be a strange view of friendship and might prefer to think

> The friends thou hast and their adoption tried,
> Grapple them to thy soul with hoops of steel.

Opinions on such a subject may, of course, differ. But to say that a considerate and self-sacrificing husband will, or perhaps should, give up his friend to please his wife is one thing. It is quite a different thing to treat a valued friendship as a thing to be lightly discarded because it is not vital in a business or social sense.

The husband evidently thought that his wife's objections to the friendship were unreasonable and due to snobbery, and he refused to give it up or to modify his behaviour in relation to it. His affection for her had undoubtedly cooled, he ceased to take the same pleasure in her company as he had taken in the early years of their marriage, and I am quite prepared to accept the view that he deliberately refused to fall in with his wife's wishes and give up his friendship for Harris, well knowing that it distressed her. I am also satisfied that there were many respects short of giving up or weakening his friendship, in which he might have acted with greater regard for his wife's feelings. He was rude and inconsiderate. He, so to speak, flaunted his liking for Harris in the face of his wife and that of the neighbourhood, in a way which, to his knowledge and not unnaturally, was distressing and humiliating to her. I must not for a moment be thought to fail in appreciating the very blameworthy nature of his behaviour and in so characterizing it I make every allowance for the effects of the unfortunate break in their marital relations of which I have spoken above. But it is not suggested that these defects in his conduct amounted to cruelty: the question is, was his conduct such as to amount to turning his wife out of doors? or was it the sort of conduct, blameworthy though it was, which one spouse may, under the obligations of the married state, be called upon to put up with throughout, perhaps, the whole of married life, in spite of the fact that great and continuing unhappiness is suffered? Speaking broadly, one would have thought that the risk of such things occurring is

one of the risks that a man or woman takes on entering into the condition of matrimony. The legislature has not thought fit to make the continuous unhappiness of one spouse caused by the unkindness, the lack of consideration, the selfishness or even the drunken degradation of the other spouse, a ground for obtaining a dissolution of the marriage. I say " speaking " broadly " merely to emphasize the distinction which, however lacking it may be in precise definition, unquestionably exists between those actions such as cruelty, adultery, desertion which the legislature regards as good grounds for a dissolution, and that type of unhappiness which, however deplorable it may be, one spouse is, as the law stands, bound to endure at the hands of the other. But, as I have already said, in cases of alleged constructive desertion it is essential to examine the actual facts in order to see whether the conduct of the spouse who is to blame can fairly and clearly be said to have crossed the borderline which divides blameworthy conduct causing unhappiness to the other spouse from conduct equivalent to expulsion from the matrimonial home. This leads me to examine a little more closely the conduct of the spouses in relation to the friendship and its manifestations of which the wife complains.

One thing is clear from the wife's own evidence. From the earliest days before what she called the " gradual deterioration " of the marriage—and she emphasized the gradual nature of the change—could have proceeded very far, she set herself to break up the friendship which was developing between her husband and Harris. She had at one time, a suspicion—some people might perhaps think it an unworthy one—that there was an improper sexual relationship between them. In this connexion, there is a passage in the cross-examination which is worth quoting at length : " (Q.) You are not, of course, suggesting " and have never thought, that there was any improper sexual " relationship between them ?—(A.) I have never known what " to think. (Q.) You have never thought that, have you ? " —(A.) I have wondered. (Q.) You have never thought it, " I suggest to you ?—(A.) And I say that I have wondered " about it. (Q.) If you wondered about it, I suppose you " formed a view about it ?—(A.) Yes. (Q.) What is the view " you formed ?—(A.) That there is no immoral relationship " between them, despite the very unfortunate—it is difficult " to explain what I mean. (Wallington J.) Association between " them ?—(A.) Yes—the whole set-up looking so peculiar.

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" (*Mr. Valentine Holmes.*) Nevertheless, you formed the view " that there was no immoral association, did you ?—(A.) Yes. " (Q.) And you never hinted in any kind of way to your " husband that you ever thought anything otherwise ?— " (A.) No, but I let him know that I knew that other people " thought it. (Q.) What did you tell him that other people " thought ?—(A.) That they would think it was a peculiar sort " of friendship between two men. (Q.) Certainly, between two " men of a different class, that is what you did tell him, is it " not ?—(A.) Yes, not only the class side of it but the whole " relationship. (Q.) I think you said in your evidence-in- " chief that you thought he regarded you as snobbish ?— " (A.) He told me that regularly, that I was a snob, he said."

There can, I think, be little doubt that this suspicion, although she discarded it, did so long as it existed, in fact influence her attitude : and she was no doubt affected by her belief that people in the neighbourhood did entertain a similar suspicion. The judge, in some rather cryptic passages, expressed the view that these suspicions were current in the neighbourhood : but Mr. Beyfus was unable to call our attention to any passage in the evidence which could support such a view. The position of the wife, believing, as she said, that other people were saying (what she herself knew to be untrue) that her husband was guilty of an infamous crime was, of course, an extremely painful one. No one can think otherwise. She can scarcely be blamed for wishing that her husband would give up a friendship which led, as she thought, to such abominable gossip, or for doing everything that she could to induce him to do so. On the other hand, the husband, knowing himself to be innocent, would not unnaturally resent the imputation (if she told him of it, as she said that she did), and it would be no more than human on his part to refuse to allow his conduct to be in any way influenced by it. It might perhaps be thought too much to have expected from the wife that she should stand by her husband in the face of such slanders, and show by her behaviour, both to her husband and to Harris, that she knew that they were untrue. But the mere existence of these alleged slanders is put forward by the wife and regarded by the judge as one of the more important of the circumstances which go to build up the case that the husband was engaged in turning his wife out of doors. But, although this was undoubtedly one of the reasons which led the wife to attempt to destroy the friendship, her motives, like many

human motives, were no doubt mixed. She objected to many other things in his conduct in relation to Harris. It is difficult to eliminate altogether a certain class feeling—snobbishness is perhaps too hard a word—and her husband's growing preference for the society of Harris—a man of little education—must have been extremely humiliating to a woman of her upbringing. But she did, I think, fail to realize that her husband had found a real friend whose company was congenial to him. The word " unnecessary " which, in her evidence, she repeatedly used to describe the association and the expression " this man Harris " which she used more than once, appear to me to throw some light on her attitude—they seem rather out of place when used in relation to a close and genuine friendship. From her point of view they were perhaps just. But from the husband's point of view they could scarcely be described as apt or sympathetic.

Another matter of objection may be mentioned here which seems to me to have little or no importance in the wife's case, even as a makeweight. Rather I should say that it is unfair to the husband to place any reliance upon it as forming part of a course of conduct on his part equivalent to turning his wife out of doors. The wife complained that her husband was making a laughing-stock of himself in the neighbourhood by his association with Harris, and as a particular example of her complaint in this respect, I may quote the following passage where she is being examined in-chief by Mr. Beyfus: " (Q.) You told us " about telling your husband that he was making himself a " laughing-stock of the neighbourhood. Had he done some- " thing in particular which caused comment in the neighbour- " hood besides associating with Harris?—(A.) His whole " attitude over everything. (Q.) Had he done something in " the nature of the way he dressed or went about? " (*Mr. Valentine Holmes.*) That is very leading. (*Mr. Beyfus.*) " I am very sorry, it was not meant to be leading at all. " Was there anything in connexion with his clothing?—(A.) He " started dressing in a country fashion instead of a town " fashion, of course. (Q.) What sort of fashion? (A.) First " of all he started wearing shorts, an open shirt, and stockings " and shoes. (Q). What sort of open shirts?—(A.) Just " ordinary aertex blues and linen ones, and red ones. (Q.) Did " he do anything else?—(A.) Yes. When he started the open " necked shirts he insisted on shaving his chest, he said it did " not look nice with an open shirt. I thought it was awful to " shave his chest and he said he did not agree."

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I need say no more about this except that the local inhabitants must have very old-fashioned ideas on the subject of dress; and I entirely fail to see why the husband should have been expected to take the slightest notice of them. As for the wife's view that it was "awful to shave his chest," this appears to me to be a matter of taste. Another point made was that the husband and Harris were in the habit of shouting childish expressions to one another as appears from the following passage: "(A.) He always cycled up from the farm with my "husband. (Q.) That may be?—(A.) And very often they "cycled down after lunch together and always, unless I am "mistaken, generally speaking, they cycled back again at "half past five. (Q.) You are not taking any exception to "any of that, are you?—(A.) No. Except that they made an "exhibition of themselves at the gate I thought. (Q.) An "exhibition of themselves?—(A.) Yes. I thought they behaved "in a most ridiculous fashion. When they bicycled up at that "time they used to shout and yell to each other at the top of "their voices when Harris was going on down the lane and "my husband was putting his bicycle in our garage. (Q.) What "do you mean 'shout and yell' to one another?—(A.) One "used to call out 'Cheerio' and the other one used to call back "'Cheerio,' and then if my husband was not going to see "Harris again until next morning he used to call out 'See you "'ell cracio el dawnio' and Harris used to roar back "'Perhapsio.' That happened regularly at my gate. (Q.) You "took strong exception to that?—(A.) Yes, I thought it was "most unnecessary." In fact, their general behaviour is aptly described by the wife's brother-in-law, Mr. Leventon, who gave evidence on her behalf in the following passage: "(*Mr. Beyfus.*) It is difficult to describe, but how would "you say Harris and Mr. Buchler behaved towards one "another?—(A.) Like a couple of irresponsible schoolboys. "(Q.) Did their relationship bear any sort of resemblance to "what one would expect between master and servant? "(A.) None whatsoever." The only comment that occurs to me in connexion with the first of these answers is "Why not?" and in connexion with the second, "Why should it?"

I have touched upon these matters at some length because they form a not inconsiderable part of the wife's case. She regarded them, not without reason (and I must not be taken to blame her), as humiliating. They must, of course, be considered as part of the general picture and there are many

more serious matters of complaint with which I shall deal later. But I can attach little or no importance to them, and some women, I cannot help thinking, would have reacted to the sort of gossip suggested in a very different way.

As I have already said, the wife from the earliest days set out to break up the friendship. It was a friendship in which she was, from the first, clearly incapable of sharing, and she, not unnaturally, disliked it. In order to induce her husband to give it up she had what she called a " plan of campaign." What she described as her " first line of approach in the early " days " was in her own words as follows : " I started by " suggesting that it was very wrong to single one man out on " the farm and take him round and never give the others a " chance. That was my first line of approach. I thought it " was very bad for the farm, very bad for the people working " on the farm, and generally very unfair." She complained that he would not argue about this, and if she started to press the matter he went out of the room or refused to go on talking about it. When this line of approach failed her next steps were as follows : " Then I told him I did not think it was fair to " Harris's wife to be dragging him off all that time. He said " that did not matter as the Harrises had never got on. " He was doing Harris a good turn by taking him out. I said " I thought it was just bad luck on Mrs. Harris and he just did " not agree with me. Then I told him he was getting himself " talked about in the neighbourhood. I think I told him he " was making a laughing-stock of himself."

Another of her tactics related to the husband's habit of having Harris to sleep in the house when she was away, a habit which she deliberately encouraged as appears from the following passage in her cross-examination : " (Q.) What I am asking " you is why, if you took such a strong objection to this " friendship, at what must have been a fairly early stage in the " friendship you went away and left your husband with Harris " in the house ?—(A.) I did it because I was on the part of my " dealing with the friendship when I was hoping my husband, " if he saw enough of him, would get sick of it. That is one of the " reasons why I did it. That is part of my plan of campaign, " if I may say so. (Q.) Throughout eight or nine years part of " your plan of campaign was to throw your husband into " association with Harris so that he would get sick of him ?— " (A.) Yes, I thought that was probably the quickest way to " get rid of him." These attempts to bring the friendship to

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an end all met with failure. Rather, they seem to have produced a result opposite to that intended. The husband was clearly much annoyed at being made the subject of such a campaign—indeed, a selfish and obstinate man, as he appears to have been, might well be annoyed.

I do not propose to speculate on what the course of events might have been if, in the early days, when there was clearly no reasonable ground for suggesting that she was being ousted from her proper position, the wife had acted differently instead of setting herself to break up a nascent friendship to which her husband—a man completely lacking in class feeling—was attaching considerable value. She might, for example, have made an effort to share in or at least to sympathize with the friendship, even though it was distasteful to her. I do not know. Her attitude towards Harris was, according to her, one of polite hostility. To use her own words, " I kept up a " continual underground battle with him." She never even hinted to Harris that by allowing her husband to devote to him so much attention and regard he was causing her unhappiness. What Harris, a very decent man, would have done if he had been tactfully and nicely approached in this way, again I do not know. One would have thought that she might anyway have tried it. It may well be that her temperament is not of the kind that would have been able to make such a sacrifice, or to take such a step. But it must not be forgotten that she on her side was demanding a sacrifice on the part of her husband which he was unwilling or temperamentally unable to make.

But I must now turn to the circumstances upon which the wife principally relies. She does not rest her case on the existence of this friendship as such, but on the fact, as she alleges, that by degrees over a period of years, it so absorbed her husband's time and interest that she was, in effect, deprived of that association which one spouse is entitled to expect from the other. This result she does not suggest had been reached or anything like it, when she first started her campaign to break up the friendship, and for that campaign at the time when she initiated it I can see no excuse whatever. But, having once begun she not unnaturally found it impossible to turn back. There can be no doubt that as the friendship developed and absorbed more and more of her husband's time and interest she suffered increasing unhappiness and felt very acutely the humiliation of seeing herself, so to speak, displaced in favour of Harris. The early years of the marriage had been particularly

happy and the recollection of this can only have added to her distress. For a woman to feel that her husband has lost interest in her company and conversation is a misfortune which calls for sympathy and pity. Such cases do unfortunately occur—a flagrant example is, of course, that of a husband who degrades himself with drink.

The judge's findings of fact are conveniently set out in his judgment. Speaking generally and with certain reservations, Sir Valentine Holmes was prepared to accept them. His case was that even if all of them are accepted, they are far from sufficient to make the husband guilty of the matrimonial offence of desertion. It cannot be disputed that, as the judge found, the reason why the wife left her husband was "her "continuous and increasing objection" to her husband's association with Harris: or that the husband knew of her objection. The judge also found that he must have known her attitude to be that some day he would have to choose between Harris and her. No doubt she used expressions of this kind, but the judge appears to have taken the view not merely that the husband ought to have taken them seriously, not merely that he ought to have acceded to her wish that he should give up the friendship (a wish that the husband regarded as unreasonable), but that, by refusing to do what she asked, he was guilty of conduct, which, in law, amounted to turning her out of doors. This view the judge supported by his finding that "on more than one occasion the husband used language of "this kind: 'If you do not like it, you know what you can do, "'you can clear out and go and live with your mother. "'I suppose you can go and live there'." Now the very occasional remarks of this kind are, in my opinion and with all respect, given much too much emphasis by the judge. What was the position? The husband had formed what to him was quite obviously a valued and cherished friendship. His wife was objecting to it for reasons which he considered snobbish and unreasonable, and from the first she conducted a carefully designed campaign in order to break it up. It appears to me that, in all the circumstances, it was to be expected that the husband would express his annoyance in some such phrase. Let me not be misunderstood. A man of refined susceptibilities would, I should hope, have done what his wife asked him, regardless of the sacrifice to himself. But we are not concerned to pass a moral judgment on the husband's conduct as a man: we are concerned and concerned only with the question whether

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his conduct amounted to desertion and I cannot attach such weight to angry expressions of this kind, as to treat them as serious invitations by the husband to his wife to leave the matrimonial home.

I have already commented on the passage from the judgment in which the judge says that the friendship was not " vital to " him in any business or social sense." The judge then proceeds to find that the husband's conduct with regard to Harris was of such a character as to justify the wife's objection. If the word " justify " is intended to mean (as I think it is), that the conduct of the husband justified the wife in leaving him and thus amounted to desertion on his part, it is the crux of the case and it is important to note the reasons given by the judge for taking this view. He says this : " The constant " association of the husband with Harris not only had the effect " of depriving the petitioner of the full consortium to which " she was entitled ; this of itself would not give the petitioner " any such rights as she now claims, but it was accompanied by " an exhibition by the husband to the rest of the farm servants, " to the population of the village, and to all the friends and " acquaintances of the parties, of a most unusual and unnatural " friendship with one of his own servants. By unnatural " I do not mean anything sexually improper. There can be no " doubt—I entertain no doubt—that this association was, " as I have said, the subject of general gossip and adverse " comment in the village and that this fact was known to the " wife and communicated by her to the husband with the " result that I have already stated. I find this friendship cast " a serious social reflection upon the petitioner not only in " itself but also because it was accompanied by a manifest " private and public preference by the husband for the " company and companionship of Harris to the increasing and " serious exclusion of the petitioner. I need only pose this " question to indicate what I mean : What would the friends " and acquaintances, the people of the village and the country " around, say if (as I am satisfied was the fact) they saw the " husband always with Harris and, as time went on—not long " after 1935 if not even before then—he was never to be seen " about with his wife. What would they say and think ? " It is not for me to supply the answer."

Mr. Beyfus agreed that this cryptic reference to talk in the neighbourhood, coupled with another passage is intended by the judge to mean that in his view people in the neighbourhood

must have regarded the husband and Harris as homosexuals, and was an answer to the question which the judge propounded as being important for him to decide. After saying that there was no impropriety in the association he went on to say: "It "does not follow that people in the village might not think this "was so odd a relationship between master and servant carried "to such an extent in public and of so constant a character "that it might be due to some such quality as that. Therefore, "it is not only unimportant for the purpose of this case to be "satisfied that there was no such quality about it, but also to "be satisfied one way or the other whether its external "manifestations might not give rise to that sort of idea in the "mind of persons without any prurient minds at all but "looking at human nature and contemplating it as one knows "it as one lives."

It is, I think, clear that the existence of gossip of this kind (which the judge thinks must have existed although, as I have said, there was no real evidence of it), formed a most important factor in leading him to the conclusion that the husband had publicly humiliated his wife. I have already made some observations on the subject of the choice between giving way to and standing up to gossip, and of how a wife might or might not behave in face of such atrocious gossip affecting her husband—a matter, no doubt, of temperament—but we are not discussing temperament. I repeat, we are discussing the question whether the husband by his conduct turned his wife out of doors: and in so far as his conduct in thus giving ground for gossip (assuming that it did) is relied upon—and it is most strongly relied upon by the wife in her evidence, by the judge in his judgment, and by counsel in argument—as one of the matters justifying the wife in regarding herself as having been deserted by her husband, I find it impossible to agree. I attach very little or no importance to this aspect of the case so far as regards what we have to decide, however foolish, obstinate and inconsiderate we may reasonably consider the husband to have been.

If this unpleasant element is excluded from the judge's reason there remains the finding that the constant association of the husband with Harris deprived the wife of the full consortium to which she was entitled. But this circumstance, the judge agrees, would not justify an allegation of desertion without the public exhibition of what, in the passage above cited, he calls "a most unusual and unnatural friendship with

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" one of his own servants "—a phrase which I must admit puzzles me. It is what he calls " the social reflection " on the wife, which to the judge's mind was the determining factor, coupled with what I have already mentioned, namely, the wife's warnings to her husband as to what she would do, and his retorts that she could go away if she liked.

I need not go through the detailed findings as to the manner of the husband's association with Harris or the holidays for which he took him in preference to his wife ; his entertainment of Harris at the house " almost as one of the family, when family " guests were being entertained," the frequent invitations to Harris to call at the house after dinner, both when there were and when there were not guests ; the time spent with Harris in the evenings at the house, leaving the wife to entertain the guests ; the evenings spent with Harris in public houses playing darts and ping pong and drinking ; the insistence on Harris sleeping in the house (a thing which the wife as a matter of fact encouraged as part of her plan of campaign) ; taking Harris to theatres in the neighbourhood without giving his wife the opportunity of accompanying him instead of Harris ; taking Harris to the motor show (he always paid two visits, taking his wife on one and Harris on the other); taking Harris to the launching of the *Queen Mary* ; taking Harris on one occasion to the stalls in a London theatre having refused to go to a theatre with his wife and others—these findings were not criticized by Sir Valentine Holmes ; all these matters the judge found to have been the cause of great humiliation and distress to the wife. One finding was, however, criticized, and rightly so namely, that " as time went on—not long after 1935 if not even " before then—he was never to be seen about with his wife." The judge cannot have had in mind the number of times when the husband and wife went for holidays together or the frequent occasions when they had friends or relations staying in the house.

On a careful consideration of the case and a study of the whole of the evidence I am forced to the conclusion that the facts relied upon were not of sufficient gravity to justify a finding that the husband deserted his wife. That they caused her intense unhappiness I have no doubt. But they were not, in my opinion, such as to justify her in treating them as a dismissal from the consortium, although the husband, I agree, behaved to his wife in a manner in which no decent man ought to have behaved. If I am right in this she could not convert

them into such a justification by announcing her intention of leaving her husband if he did not change his conduct. If conduct is not a justification for one spouse to leave another, it cannot be made such by threats of this kind. Moreover, if the conduct in question is in its nature insufficient, a statement that if she did not like it she could go, even if taken at its face value, could not, in my opinion, give to that conduct the character of desertion in fact. As I indicated earlier in this judgment, constructive desertion requires both factum and animus and an indication by the husband to the wife that she may leave him if she likes (animus) is not enough, unless the conduct is such as to amount to an expulsion (factum). This is not, in my opinion, affected by the doctrine that a person must be taken to intend the probable consequences of his acts: for if the acts are not such as to justify the wife in treating herself as expelled from the matrimonial home no inference can be drawn from those acts of an intention to expel her. Mere wish to expel, even if it exists, without acts equivalent to expulsion is, in my opinion, insufficient to constitute constructive desertion.

Accordingly, I am of opinion that the husband's appeal against the decree must be allowed. He also appeals against the judge's refusal to grant him a decree. Mr. Beyfus agreed that if the husband's conduct was not such as to justify her in treating herself as a deserted wife, she must be regarded as having deserted him and that he would be entitled to a decree. In this Mr. Beyfus was, in my opinion, clearly right. A decree must be granted to the husband. The case is a very sad one.

ASQUITH L.J. I agree and will only add a few sentences. The law applying to this case is, I feel, somewhat simpler than it has been made to appear at certain stages of the argument. In the first place it is common ground—and a commonplace—that the spouse who leaves the matrimonial roof is not necessarily the deserter. Constructively, the deserter may be the party who remains behind, if that party has been guilty of conduct which justifies the other party in leaving. Secondly, to afford such justification the conduct of the party staying on need not have amounted to a matrimonial offence, such as cruelty or adultery. But thirdly, it must exceed in gravity such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other " for " better, for worse." The ordinary wear and tear of conjugal

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life does not in itself suffice. Where the learned judge seems to have erred is in supposing that on the evidence before him conduct complying with this last test had been established.

It is difficult to deduce from the decided cases any principle of law by reference to which it can be determined in every case on which side of this line the case falls. To say that the petitioner must establish conduct by the respondent which has made it "practically impossible for the parties to live properly "together" or which "drove the petitioner out" is to propound a criterion too vague to be very helpful. It is, I think, possible to say of certain courses of conduct that they could not amount to constructive desertion, and of certain other courses that they could not fail to do so. This would appear to be a question of law, involving, as it does, the issue whether there was any evidence or no evidence to support the judge's conclusion. But between the extremes indicated there is obviously a no-man's land where the issue is one of fact. This does not debar an appellate tribunal from disturbing the judge's findings if in the view of that tribunal they are plainly wrong.

What was the course of conduct on the part of the husband in this case which the learned judge held sufficient to justify the wife in leaving him, or, having left for other reasons, in deciding not to return? My Lord has analysed it in detail and what I venture to add is purely by way of summary. First, it is said that he contracted a strange, but admittedly quite innocent friendship, for a farm hand in his employment, a man named Harris, belonging to what is vulgarly but conveniently called a different social class. Secondly, it is said that the husband preferred the company of Harris to that of his wife, that he made that preference obvious, and that this was humiliating to her. In the judgment there are nine findings of fact, as to incidents alleged to involve neglect of, and humiliation to, the wife and none of these particular findings are challenged on behalf of the husband. (There is, apart from these findings another to the effect that "after 1935, "if not even before then, he was never seen about with his "wife"—but I disregard this because as my Lord has pointed out it is quite inconsistent with the evidence.) Thirdly, it is said, and the learned judge has found, that innocent as was in fact the association with Harris, friends and acquaintances of the parties, and the villagers—not only the prurient among them—would be likely to think it had a homosexual basis, and that it was wrong of the husband to act in a manner which

was calculated to convey that impression and provoke gossip of this order, however baseless. These three elements in the husband's conduct in their combination were held by the learned judge sufficient to justify the wife in leaving, and accordingly to convict the husband of constructive desertion.

I agree with the Master of the Rolls that they did not so suffice. As to the first head of complaint—association with what it is fashionable to call a social inferior is not on any view legally or morally wrong in itself, and may well be a virtue in so far as it helps to break down senseless social barriers and class prejudice. If, of course, the association of two men with such different backgrounds could only be explained on the assumption of a homosexual tie, the case would be different; but the supposition is expressly disclaimed by the wife. As to the second head of complaint, the husband cannot be absolved from neglect and want of consideration for his wife. But this is a charge which thousands of spouses could prefer against each other with abundant justification; but without any hope or prospect of securing legal relief as the ground of constructive desertion or otherwise. It may, no doubt, be galling—or in some sense of the word humiliating—for a wife to find that the husband prefers the company of his men friends, his club, his newspaper, his games, his hobbies, or indeed, his own society, to association with her, and a husband may have similar grievances regarding his wife. But this is what may be called the reasonable wear and tear of married life, and if it were a ground for divorce, a heavy toll would be levied on the institution of matrimony.

None of the cases cited, in my view, come near to deciding that conduct such as that of this husband entitled a wife to the relief claimed. Habitual drunkenness (unless accompanied with a certain degree of violence or threats of violence), persistent nagging and insult, even incest, forgiven but followed by an indecent assault on a girl of thirteen, to mention nothing else, have been held not to suffice.

There remains the third ground of complaint—that the husband's association with Harris, however innocent in fact, must or should have been known to him to be likely to encourage gossip and the suggestion of homosexualism. No witness has in fact come forward to say either that he was led by the husband's behaviour to suppose he was a homosexual or to

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testify to the existence of gossip to that effect. The learned judge is not concerned with the effect the husband's conduct actually had on local public opinion but on the effect which in the learned judge's view it was calculated to have. But let it be assumed that this type of gossip did arise from a misconstruction (for it would have been misconstruction) of conduct in fact perfectly innocent on the part of the husband, though perhaps defiantly persisted in and paraded. I entirely agree with the Master of the Rolls in feeling that this would tend to rally the average wife to the defence of her husband when he was grossly traduced, rather than to impress her as a sufficient or contributory ground for leaving him. Neither singly nor in combination with the other matters complained of does this factor seem to me to establish a constructive desertion by the husband.

I agree that, as the result of this appeal the wife's petition fails and the husband's succeeds. I agree that a decree must be granted to the husband.

VAISEY J. I agree. If the contest had been as to which of the two spouses had most to put up with from the other, and to which of them the unhappiness which subsisted during the latter part of their married life was chiefly due, I apprehend that we should have laid the blame upon the husband. But the issue is of a different character, and what we have to decide is whether the separation between them which began on April 1, 1941 (or at any rate on October 7, 1942), is to be attributed to a desertion on the part of the wife, by her actual abandonment of her husband and the matrimonial home, or to a notional or, as it is called, "constructive" desertion of the wife by the husband. I would only add to what my Lords have said as to the nature and limits of this doctrine of constructive desertion that the misconduct upon which a case of such desertion would be founded would nowadays rarely if ever amount to a matrimonial offence, because such an offence if it existed would itself give the other spouse a right to relief, and obviate the necessity for any application of the doctrine.

It is clear that the husband displayed eccentricities of behaviour which were very galling and irritating to the wife. He was not, I think, ill-natured, but rather stubborn, and certainly lacking in the finer perceptions; he was simple, perhaps rather silly, and had become somewhat bucolic in

his ways and manner. As to the wife, she seems to me to be deserving of some sympathy, though her " plan of campaign " strikes me as being rather cold-blooded, and it was certainly ill contrived and futile. Now the question is whether the conduct or misconduct of the husband was such as to compel her to leave him, and was intended or must be presumed to have been intended to bring about that result. Or the matter may be put thus : whether, having regard to that conduct or misconduct it was within her rights and consistent with her duties as his wife to leave him. For myself, I think that so far from being entitled to leave him she was under a strong positive obligation not to do so, believing as she did that the eccentricities to which I have alluded had created or were creating in the minds of their neighbours and others the suspicion that her husband's association with the man Harris was of a criminal, or at any rate, degrading nature, and convinced as she was that the suspicion was baseless, she took the one step that was best calculated (and she should have known it) to confirm the unjust suspicion, if it existed, and to redouble the gossip and scandal to which it must inevitably have given rise. We do not know how far the existence of the suspicion was real or imaginary, nor for this purpose does it matter. Believing as she did, and convinced as she was, I think it was her duty not to forsake her husband but to protect his good name by her continued presence in the matrimonial home, and not less so because his need for her protection was, in her view at least, due to his own stupid folly and indiscretion. I should have thought that it was an elementary obligation of a wife to support and countenance a husband accused or suspected, whether justly or not. Here the wife believed that the husband was suspected unjustly, and yet she left him.

I would acquit the wife of anything like a conscious or deliberate dereliction of her duty, and would account for what she did by her having become so obsessed with her wrongs and grievances that she persuaded herself that they justified her in taking a step which she thought would secure for her comfort and peace of mind, without reflecting at all on the probable or possible serious consequences of it to the husband. I cannot believe that he meant to expel her from their home, or that she ever thought that he meant to do so, and I cannot hold that his behaviour in their matrimonial relationship ought to be regarded as the equivalent of an actual or intended expulsion of her. I think that she found herself unable to

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tolerate him any longer, and so she left him, that is to say she deserted him, with the result that he is entitled to a decree.

Appeal allowed.

Solicitors for the husband: *Mawby, Barrie & Letts.*
Solicitors for the wife: *Ingledew, Brown, Bennison & Garrett.*

J. W. H.

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Oct. 28.

Lord Merriman P. and Byrne J.

Husband and wife—Practice—Summons before justices—Dismissal without reasons stated—Application by appellant for reasons—Refusal by magistrate's clerk—The Matrimonial Causes Rules, 1944 (*St. R. & O.* 1944, *No.* 389/*L.* 16), *r.* 68, *sub-r.* 3.

By r. 68, sub-r. 3, of the Matrimonial Causes Rules, 1944, appeals to the Divisional Court of the Probate, Divorce and Admiralty Division of the High Court must be supported, inter alia, by two copies of the justices' clerks' notes of the evidence and two copies of the reasons of the justices for their decision. Whereas justices therefore may well be entitled to give no reason when making or refusing an order, they are bound to supply proper and sufficient reasons for their decision in the event of an appeal. Without such reasons the Divisional Court is unaware what considerations, if any, were applied by the justices to the facts of the particular case.

APPEAL to the Divisional Court.

On June 26, 1946, the justices of Luton dismissed two summonses, taken out by a wife against her husband, the one for desertion and the other for wilful neglect to maintain her—no reasons were given at the time by the justices. The clerk to the justices, when requested by the wife's solicitors by letter to supply reasons replied: "I confirm that no reasons were "given in court for the decision of the justices, but I think it is "clear from the evidence what their reason was!"

[Reported by GERALD REED, Esq., Barrister-at-Law.]

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Elborne for the appellant wife dealt only with the facts of the case.

Phillimore for the respondent husband: (after replying to the matters in general issue:) A refusal by the magistrates to supply reasons left the matter quite open as to whether or not their reasons were adequate; nor is it possible to assess what consideration if any was given to any particular fact or facts proved. It is extremely hard on the parties that they should now be penalized for a default on the part of the justices, and especially on a husband who will have to bear the costs of both sides.

LORD MERRIMAN P. (after dealing with the facts:) It is common ground that in open court the justices gave no reasons for their decision. In a letter, dated July 18, 1946, the justices' clerk, writing to the appellant wife's solicitors, said: "I confirm "that no reasons were given in court for the decision of the "justices, but I think it is clear from the evidence what "their reason was."

I am about to make some general observations, and I hope they will receive sufficient publicity to ensure that they reach justices' clerks throughout the country. This is the third time during this batch of appeals that words to the above effect have been employed by a justices' clerk in response to the demand for the reasons for the justices' decision. For very many years past this court has insisted, in reported cases, and over and over again in unreported cases, that it is the duty of justices not merely to take a proper note of the evidence, but also, in the event of an appeal, to give this court a statement of the reasons for their decision. Justices are not, like judges of the High Court, obliged to give their reasons at the time of the decision. They are entitled to make the order, or decline to make the order, without giving reasons, but they are bound to give this court, in the event of an appeal, a proper and sufficient statement of the reasons upon which their decision was based. There should never be any difficulty whatever in doing so, for whether the court is or is not bound openly to express the reasons for its decision in court; whether it be the highest court in the land or the humblest and whatever its jurisdiction may be, no court can give a proper decision in any case without formulating to itself at the time of the decision the reasons upon which such decision is based. It is, therefore, no answer —(indeed, it is a defiance of this court)—for justices' clerks to

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state that no reasons were given in court for the decisions of the justices, and I wish to say quite plainly that if this court is treated in this way again after this warning, it may be necessary for us to consider what powers we have to ensure that the parties are not put to unnecessary expense owing to dereliction of duty on the part of justices' clerks. I have spoken plainly, and I intended to speak plainly, and I hope that on this occasion some notice will be taken of what we are saying. This case is a glaring example of the inconvenience which arises from this dereliction of duty. We are not going to decide the case; we are going to send it back for hearing by some tribunal which will carry out its duties properly, and, therefore, I propose to say as little as possible about the facts of the case beyond making it clear what are the issues which arise and how complete is our ignorance of what has been decided.

BYRNE J. My Lord has indicated the many considerations which should be applied to this case, but owing to the failure of the justices and their clerk to do that which they are required to do, namely, to inform this court of the reasons for the decision at which they arrived, we are quite unable to say what considerations, if any, were applied by the justices to the facts of this case. I should just like to add that the rule with regard to this matter, which is the rule under which justices must act, is r. 68, sub-r. 3, which reads as follows: "The appeal should "be entered at the Divorce Registry by lodging at the Registry "two copies of the Notice of Motion. There shall be lodged at "the same time two certified copies of the summons and the "order appealed against, two copies of the justices' clerks' "notes of the evidence and two copies of the reasons of the "justices for the decision."

Solicitors for the appellant: *Lathom & Co., Luton.*
Solicitors for the respondent: *Machin & Co., Luton.*

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Dec. 19.

Lord Greene M.R., Morton and Somervell L.JJ.

Divorce—Decree nisi—Appeal pending—Application to make decree absolute—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 31, *sub-s.* 1 (*e*), *s.* 184, *sub-s.* 1.

The statutory right of appeal against a decree nisi or absolute is indefeasible, and the rights conferred by s. 31, sub-s. 1 (*e*) (1) and s. 184, sub-s. 1 (1) of the Judicature (Consolidation) Act, 1925, must be so construed as not to interfere with it. Accordingly a judge of the Divorce Division has no discretion or right to grant an application to make absolute a decree nisi against which an appeal is pending. He must take no step to make the pending appeal ineffective; and, in particular, he is not entitled to exercise any technical discretion which he may have to make a decree absolute while an appeal is pending because in his opinion the appeal is frivolous or vexatious or otherwise without merit.

APPLICATION for stay of an order of Wallington J.

On November 8, 1946, a wife was granted a decree nisi of divorce. Being anxious to remarry before the expiration of the necessary six weeks, she applied to Wallington J. to have the decree made absolute in less than six weeks. On that application, which was made in chambers, the judge was informed that the husband had served notice of appeal against his order granting a decree nisi. Wallington J., being of opinion that the appeal was vexatious and that it should not prevent his making the decree absolute in accordance with the application, gave instructions for the cause to be listed among those in which decrees were being made absolute on a particular day. The husband applied ex parte to the Court of Appeal for a stay of the decree absolute. The court directed him to give notice of his application to the wife, who duly appeared in the

(1) Supreme Court of Judicature (Consolidation) Act, 1925, s. 184, sub-s. 1: "As soon as any decree "for divorce is made absolute, "either of the parties to the "marriage may, if there is no "right of appeal against the decree "absolute, marry again . . . . "or, if there is such a right of "appeal, may so marry again, if "no appeal is presented against "the decree, as soon as the time "for appealing has expired, or, if "an appeal is so presented, as soon "as the appeal has been dismissed."

Section 31, sub-s. 1: "No appeal "shall lie . . . . (*e*) from an "order absolute for the dissolution . . . . of marriage in favour "of any party who, having had "time and opportunity to appeal "from the decree nisi . . . . has "not appealed from that decree."

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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present application of the husband, which was for a stay of Wallington J.'s order that the cause should be listed on the particular day for the decree to be made absolute.

The husband appeared in person.

William Latey for the wife. Admittedly, once a decree is made absolute, any pending appeal is rendered nugatory, for the wife is at liberty to marry another man. The present application for a stay, however, is an abuse of the process of the court, for it is part of a long course of obstruction designed to prevent the wife's marrying again. Or. 25, r. 4, gives the court an inherent jurisdiction to stay any proceedings which are obviously vexatious or frivolous. There is nothing in the Matrimonial Causes Rules which regulates this question, but r. 81 makes the Rules of the Supreme Court apply to the practice and procedure in matrimonial matters. Accordingly, Or. 25, r. 4, should be applied here. The husband's conduct at the trial gives the clearest indication that there is unlikely to be any real ground of appeal: His case was nebulous and included almost every possible plea which can be put forward in a divorce suit. The evidence which he called was too slight to be taken seriously, and he elected not to go into the witness-box himself. In the course of the many interlocutory proceedings which have taken place, he has indicated grounds of appeal which plainly lack substance. Before he is granted any stay on this application the court should, it is submitted, at least require from him a statement of his grounds of appeal, and in any case should fix an early date for the hearing of the appeal, so that the wife will not be deprived indefinitely of the opportunity of marrying another man who must soon go overseas.

LORD GREENE M.R. This application raises what appears to be a novel point in divorce procedure. The reason why it has not come up for discussion before is, no doubt, that, until recently, a period of at least six months had normally to elapse between the decree nisi and the decree absolute. The period is now reduced to six weeks, so that, whereas in most cases in the old days an appeal would have been heard and determ ined before the six months had elapsed, nowadays it is equally certain that, save in exceptional circumstances, an appeal will not be heard before the six weeks have elapsed. The question at issue is what is the effect of serving a notice of appeal on the power of the Divorce Court to make absolute the decree nisi against

which the appeal is brought? [His Lordship stated the facts.]

The position, it will be observed, is rather curious: First, save in cases which by statute or rule admit of no appeal, the right of a litigant to appeal against a judgment which is adverse to him is given by statute and cannot be taken away. We, therefore, have before us an appeal which is perfectly competent in pursuance of the husband's statutory right. Whether or not that appeal is vexatious, whether or not there is any merit or foundation for it, is a matter for this court and not for the trial judge to decide. The litigant has the right to come to this court, and nobody has the right to stop his doing so. It is impossible for us on an interlocutory application of this sort to consider whether or not the appeal has any merits, for we can only decide what merit there is in an appeal when we have heard it, as the husband here has the right to require us to do. The wife, on the other hand, has a statutory right to have her decree nisi made absolute, subject to the qualification that a divorce judge has a discretion to postpone the making of the decree absolute to a time subsequent to the expiration of the statutory period of six months or six weeks. Those are the rights of the two parties, and it is obvious that there may be a conflict between those two rights. If the decree is made absolute while an appeal is pending, the effect must necessarily be to render the appeal completely abortive, to nullify it, and to deprive the appellant of the right which is his by statute to have his appeal heard and determined by this court. While confirmed in that view by the fact that counsel agrees with it, I base my view on the language of the relevant statute itself. By s. 183, sub-s. 1, of the Judicature (Consolidation) Act, 1925: "Every decree for a divorce . . . . shall, in the first instance, "be a decree nisi not to be made absolute until after the "expiration of six months from the pronouncing thereof, unless "the court by general or special order from time to time fixes "a shorter time." By the recent order, which is a general one, the court has fixed six weeks for the decree absolute. [His Lordship read s. 184, sub-s. 1.] That sub-section says nothing about pending appeals from decrees nisi. The only appeal mentioned is that against the decree absolute, and it is provided in terms that the parties may marry again if there is no right of appeal against the decree absolute. The circumstances in which there is a right of appeal against a decree absolute are prescribed by s. 31, sub-s. 1 (*e*). [His

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Lordship read it.] It follows, therefore, that, if a decree absolute is made, the husband here will not be in a position to appeal against it under s. 184, sub-s. 1, because he is not a person who had no opportunity to appeal against the decree nisi. On the contrary, he has actually appealed from the decree nisi, and, therefore, his right of appeal against the decree absolute would never arise. The effect of that sub-section seems to me to be that, directly the decree absolute was made, first, the appeal against the decree nisi would become abortive because the parties would be at liberty to marry again under s. 184, sub-s. 1, and, secondly, there would be no chance of appealing against the decree absolute because the husband could not satisfy s. 31, sub-s. 1 (*e*). That appears to lead to the result that, on the one hand, the husband has a statutory right to appeal, while, on the other hand, the terms of the legislative provisions regarding divorce, construed literally and by themselves, put it within the power of the Divorce Court to destroy that statutory right.

The two statutory rights have to be reconciled, and the only way of doing so is this: The right of appeal is absolute and not to be in any way interfered with. The divorce judge, when an application is made to him to make a decree absolute, must inform himself (he would naturally be informed) whether or not there is a pending appeal. If there is a pending appeal, he has, in my opinion, no discretion or right to pronounce a decree absolute, for by doing so he will be destroying the right to appeal to this court. Whenever there is an appeal to this court the judge has no option: he must not take any step which would make the appeal ineffective, and the making of the decree absolute would do that. I am confirmed in that view by the fact that within the memory of the officials at the Divorce Registry it has never been the practice to put a cause in the list to have the decree made absolute in a case where there is a pending appeal: the cause is simply kept out of the list. I think that that practice must have originated from a recognition of what I have just said, namely, that the judge ought not to make a decree absolute when an appeal is known to be pending.

It was suggested that the proper course for an appellant to take who knew or thought that his appeal would not be heard and determined before the date when the decree was due to be made absolute was to apply to the judge or to this court under Or. 58, r. 16, which provides: "An appeal shall not operate

"as a stay of execution of proceedings under the decision "appealed from, except so far as the court appealed from, or "any judge thereof, or the Court of Appeal, may order . . . ." That rule, it is argued, was incorporated in r. 81 of the Divorce Rules, which provides: "Subject to the provisions of these "rules and of any statute, the Rules of the Supreme Court "shall, notwithstanding the provisions of Or. 68 thereof, apply "with the necessary modifications to the practice and pro-"cedure in any matrimonial cause or matter to which these "Rules relate." Order 58, r. 16, is, in my judgment, quite inept to solve the particular problem now before us, having regard to the facts that the right of appeal is an absolute right and that it is peculiar to divorce that, once the decree absolute is made, there is no right of appeal against it and the parties are at liberty to re-marry. The axe has fallen and nothing can be done to undo what has been done.

Taking the whole thing together, I am of opinion that the divorce judge, even if technically he has a discretion to make the decree absolute, is not entitled to exercise that discretion in a case where to his knowledge there is a pending appeal. A fortiori he is not entitled to decide to make a decree absolute because he does not think that there is anything in an appeal. That appears to me to be the inevitable result of the legislation relating to this question.

It must not be thought that I do not appreciate the hardship on the wife here who wishes to re-marry and go abroad; but we are here to administer the law as laid down by Parliament, and we cannot make exceptions because of hardships. It is suggested that something might be done to see that the husband does not delay in the prosecution of his appeal. The opportunities for delay in the case of an appeal are nothing like what they are in the case of an action, for, when an appeal has found its way into our list, it can only be stood out of the list for some good cause. Nevertheless there are ways in which the appeal could be delayed, though not for any indefinite period, and counsel would be quite within his rights in coming to this court and asking for directions in the event of his considering that the husband had been to blame for any delay. He could apply for a date to be fixed, and from what we have heard of the case I think it extremely likely that we should accede to an application to expedite the hearing. I do not think that we are entitled at this stage to impose conditions on the husband. His right of appeal is absolute, and we have no right to refuse

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him relief or to impose, as a condition of giving that relief, some condition or obligation on him. On the other hand, the court is concerned to see that undue hardship is not caused to the other side, and counsel may take it that his application to expedite the appeal will receive our serious consideration.

The result is that we must make an order that the cause is not to appear in the list for making the decree absolute pending the determination of the appeal.

MORTON L.J. I agree. I think that the conclusion which my Lord has stated is the inevitable result of the existing legislation. Counsel has suggested that this appeal is wholly vexatious, and that it is an attempt on the part of the husband, out of spite, to prevent his wife from marrying the man whom she desires to marry and who is going overseas soon. It is impossible for us to determine to-day whether that is so or is not so. If that is the fact, the husband's behaviour is extremely contemptible, but we cannot prejudge that issue. He has an absolute statutory right of appeal, and, at this moment, we do not know whether the appeal is well founded or not. I agree with the order proposed.

SOMERVELL L.J. I agree.

Application granted.

Solicitors: *Ludlow & Co.*

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Jan. 24.
Willmer J.

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Maintenance—Order for secured maintenance—Liberty to apply as to nature of security—Provisions of order as a whole—No power to vary order—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-s.* 1—*Administration of Justice (Miscellaneous Provisions) Act,* 1938 (1 & 2 *Geo.* 6, *c.* 63), *s.* 14.

The court has no power to vary an order for secured maintenance, even though liberty to apply as to the nature of the security is reserved by the order.

Quaere whether it is proper to reserve liberty to apply in such an order at all.

SUMMONS adjourned into court.

Respondent husband's appeal against a variation of a maintenance order.

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The registrar, following the pronouncement of a decree absolute of divorce, made an order for maintenance at the rate of a certain sum per annum, and in addition ordered the respondent to secure to the petitioner an annual sum upon certain capital in England. Liberty to apply as to the nature of the security was given. It was then found that the respondent had no capital in England; and the petitioner therefore issued a further summons under the liberty to apply asking that the security should comprise certain other interests. The registrar made an order in the terms prayed, and the respondent appealed.

S. Seuffert for the appellant.
Frank Whitworth for the respondent.

Cur. adv. vult.

WILLMER J. This is an appeal by the respondent husband against an order made by Mr. Registrar Forbes varying a previous order made by him for maintenance, in so far as the same related to an annual sum ordered to be secured for the petitioner by the respondent. The ground of the appeal is that, according to the respondent, the learned registrar had no power to vary his own previous order with regard to secured maintenance. In view of the importance of the point and the authorities to which I was referred I have thought it right to take time to consider my decision and to pronounce my judgment in open court.

The history of the matter can be shortly stated. The petition was based on adultery. The respondent did not defend the proceedings, and on September 3, 1945, a decree nisi was pronounced by Pilcher J. The decree was made absolute on March 11, 1946, and on the following day the petitioner filed notice of application for maintenance. The learned registrar, by an order dated July 4, 1946, ordered the respondent to pay to the petitioner for her own maintenance 150*l.* per annum less tax and a further sum of 52*l.* per annum for the maintenance and education of the child of the marriage, and he further ordered the respondent to secure to the petitioner for her life dum sola the annual sum of 50*l.* less tax upon the balance of the respondent's capital now remaining in England. The order further gave liberty to apply as to the nature of the security. The petitioner did not appeal against this order, but the respondent did. His appeal was dismissed by Byrne J.

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and a further appeal to the Court of Appeal was in turn dismissed by order of November 20, 1946.

The respondent is a chartered accountant, and holds an appointment in Turkey, in respect of which he is in receipt of a salary and a cost-of-living bonus. He is also a beneficiary under the wills of his parents, lately deceased, and the amount of his interest under the two wills is estimated at 3,650*l.* The estates of the respondent's parents are being administered by a firm of writers to the signet in Edinburgh. It appears that up to date the respondent has received some 2,000*l.* odd of the total due to him, and there remains due something in excess of 1,600*l.* I was informed that the reason for the wording of the learned registrar's order, that the annual sum of 50*l.* should be secured on the balance of the respondent's capital now remaining in England, was to make it clear that any assets which the respondent might have in Turkey were to be excluded, since it was not thought desirable to tie up any assets in Turkey so as to impair the ability of the respondent to earn his living in Turkey.

After the dismissal of the respondent's appeal to the Court of Appeal it appeared, apparently for the first time, that he was not in possession of any capital in England. Apparently the 2,000*l.* received by him under his parent's wills had already been expended, and the balance of 1,600*l.* was (and is still, so far as I am aware) in the hands of the lawyers in Scotland. In these circumstances, the original order of the learned registrar, in so far as it ordered the annual sum of 50*l.* to be secured on the balance of the respondent's capital now remaining in England, was of no value to the petitioner. A further summons was therefore issued by the petitioner, under the liberty to apply in the previous order, asking that the security to be provided by the respondent for the annual sum of 50*l.* should comprise the stocks, shares, moneys and securities, the land and house, furniture and other effects, or the proceeds thereof when realized, and any other property devised or sequestered to the respondent by his late father and mother and now being administered by the lawyers in Edinburgh. The learned registrar made an order in the terms prayed, and it is from this order that the present appeal is brought.

It should be said at once that the respondent's behaviour throughout appears to be completely without merits. With the salary which he earns from his appointment in Turkey

and the amounts received, or to be received, under the wills of his late parents, it is obvious that he is in a financial position to provide reasonable maintenance for the petitioner. Quite apart from the fact that it was his misconduct which broke up the marriage, he appears to have done his best to evade his responsibilities to the petitioner and the child of the marriage. It is only necessary to mention the abortive appeals from the original maintenance order and the manner in which the moneys already received under the wills of his parents appear to have been recklessly squandered. One cannot but sympathize with the petitioner in the difficult position in which she has been placed. The decision of this appeal, however, does not depend on the merits of the parties, or on sympathy with the petitioner in her difficulties, but upon whether the learned registrar had power, as a matter of law, to make the order now complained of.

The original order of the learned registrar, in so far as it provided for secured maintenance, was of course made in pursuance of the powers conferred by s. 190, sub-s. 1 of the Supreme Court of Judicature (Consolidation) Act, 1925 (1). The provisions for variation of orders for alimony, maintenance and periodical payments are now consolidated in s. 14 of the Administration of Justice (Miscellaneous Provisions) Act, 1938 (2). Under this section the court has power to discharge

(1) Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, sub-s. 1: "The court may, if it "thinks fit, on any decree for "divorce or nullity of marriage, "order that the husband shall, "to the satisfaction of the court, "secure to the wife such gross sum "of money or annual sum of money "for any term, not exceeding "her life, as having regard to her "fortune, if any, to the ability "of her husband and to the con- "duct of the parties, the court "may deem to be reasonable, and "the court may for that purpose "order that it shall be referred to "one of the conveyancing counsel "of the court to settle and approve "a proper deed or instrument, "to be executed by all the "necessary parties, and may, if it "thinks fit, suspend the pro- "nouncing of the decree until the "deed or instrument has been "duly executed."

(2) Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 14: "(1.) Where under "the Supreme Court of Judicature "(Consolidation) Act, 1925, the "court has made, whether before "or after the passing of this Act, "any of the following orders, that "is to say:—

"(*a*) an order under s. 187 of "that Act for the making or "securing of periodical payments;

"(*b*) an order under sub-s. 2 of "s. 190 of that Act for the pay- "ment of any monthly or weekly "sum for the maintenance and

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or vary such orders, to suspend the provisions thereof, or to revive the operation of any provisions so suspended. But this section is silent as to any power to vary an order for secured maintenance made in pursuance of s. 190, sub-s. 1 of the Act of 1925. There is not, and so far as I know there never has been, any statutory power to vary or discharge an order for secured maintenance. This is made abundantly clear by the decision of the Court of Appeal in *Blyth* v. *Blyth* (1), in which case the court refused to rescind an order for secured maintenance, notwithstanding the fact that both parties desired its rescission. That, of course, was a case in which a deed had already been executed in pursuance of the order, and it may be said that the present case is different because as yet no deed has ever been executed. But it is clear that the decision of the Court of Appeal did not depend on the fact that a deed had in that case been executed. On the contrary, the judgment of Goddard L.J. (as he then was) makes it quite clear that it is not only the deed, but the order under which the deed was executed, that the court has no power to rescind.

The rule that the court cannot rescind or vary an order for secured maintenance is not really challenged by the petitioner. It is argued that what the learned registrar has done in this case does not amount to a variation of his previous order, but that, having reserved liberty to apply as to the nature of the security in his original order, he was free, on the subsequent summons, to make a further order specifying what

" support of either party to the " marriage ;

" (*c*) an interim order under " sub-s. 3 of the said s. 190 " for the payment of money by " way of alimony or otherwise to " either party of the marriage, or " the like order in proceedings for " judicial separation ;

" (*d*) an order under sub-s. 4 of " the said s. 190 for alimony to " either party to the marriage, or " any other order for alimony ;

" (*e*) an order under sub-s. 2 " of s. 191 of that Act for the " making of periodical pay- " ments out of profits of trade " or earnings ; or where before " the commencement of that Act " the court has made any similar " order under the enactments " thereby repealed, the court shall " have power to discharge or vary " the order or to suspend any " provisions thereof temporarily " and to revive the operation of " any provisions so suspended.

" (2.) In exercising the powers " conferred by this section, the " court shall have regard to all the " circumstances of the case, in- " cluding any increase or decrease " in the means of either of the " parties to the marriage."

(1) [1943] P. 15.

securities should be comprised within the order. I regret that I am unable to agree. Having regard to what was said by Hill J. in *Shearn* v. *Shearn* (1), I doubt very much whether in an order of this character it was proper to reserve liberty to apply at all. This point was not before the Court of Appeal, because it was not necessary for their decision on the hearing of the previous appeal by the respondent; nor is it necessary for me to decide it now; for even if it was proper to reserve liberty to apply, that provision must be read subject to the provisions of the order as a whole, and in particular subject to the provision that the order for payment was to be secured upon the balance of the respondent's capital now remaining in England. How could the liberty to apply empower the learned registrar to make an order securing payment upon capital not in England—which is what he has in fact done? To do so amounts, in my judgment, to a variation of the original order, which is outside the power of the court. It appears to me that what was said by Hill J. in *Shearn* v. *Shearn* (1) is very much in point, and I think it is valuable to quote a short passage from his judgment. "But the court "has no power to modify an order to secure, nor has it "power in modifying an order to pay to turn it into an order "to secure. The two orders are essentially different. The "order under s. 190, sub-s. 1, is not an order to make periodical "payments and secure the payments; it is an order to secure "and nothing else. Under it the only obligation of the husband "is to provide the security; having done that, he is under "no further liability. He enters into no covenant to pay "and never becomes a debtor in respect of the payments. "The wife has the benefit of the security and must look to it "alone; if it ceases to yield the expected income she cannot "call upon the husband to make good the deficiency."

Applying that to the present case, the only obligation of the respondent under the original order to secure was to provide the security specified—that is, his capital now remaining in England. Having done that he is under no further liability; equally he is under no further liability if there is no capital now remaining in England; he cannot now be forced to provide other or different security—that is, capital not at the time of the order in England.

For these reasons, although I sympathize with the petitioner in the difficulties in which she finds herself, I cannot do other

(1) [1931] P. 1, 4.

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than allow the present appeal. It appears to me that the petitioner's remedy, if the maintenance provided under the original order falls short of what is just, lies in a different direction. As has been previously pointed out, the court always has power in a proper case to vary an order for unsecured maintenance. It may be that where, as here, the provision for secured maintenance fails, a strong case could be made out for variation of the unsecured monthly or weekly payments.

Solicitors for the appellant: *Crawley & de Reya.*
Solicitor for the respondent: *Russell & Arnholz.*

J. B. G.

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Feb. 7.

Willmer J.

PRYOR *v.* PRYOR.

Divorce—Custody of children —Decree made absolute—Petitioner since deceased—Custody to petitioner's parents—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 193, *sub-s.* 1—*Matrimonial Causes Act,* 1859 (22 & 23 *Vict., c.* 61), *s.* 4.

Application having been made by the parents of a deceased petitioner, whose marriage with the respondent had been dissolved, for leave to intervene in the suit for the purpose of asking for the custody of the children of the marriage, and for an order for such custody :—

Held, that having regard to the wide powers now conferred by s. 193, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925 (1), the decision in *Davis* v. *Davis* (1889) 14 P. D. 162, in which a similar application was made under s. 4 of the Matrimonial Causes Act, 1859 (2), was no longer authoritative, and the present application could be granted.

(1) Supreme Court of Judicature (Consolidation) Act, 1925, s. 193, sub-s. 1: "In any proceedings "for divorce or nullity of marriage "or judicial separation, the court "may from time to time, either "before or by or after the final "decree, make such provision as "appears just with respect to the "custody, maintenance and education of the children, the "marriage of whose parents is the "subject of the proceedings, or, "if it thinks fit, direct proper "proceedings to be taken for "placing the children under the "protection of the court."

(2) Matrimonial Causes Act, 1859, s. 4: "The court, after a final decree "of judicial separation, nullity of "marriage, or dissolution of "marriage, may upon application "(by petition) for this purpose, "make, from time to time, all such "orders and provisions with "respect to the custody, maintenance, and education of the "children the marriage of whose

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SUMMONS adjourned into court.

The petitioner was granted a decree nisi on the ground of her husband's desertion on October 18, 1945, and given the custody of the two children of the marriage. The decree was made absolute in April, 1946, and on August 12, 1946, the petitioner died, having made no testamentary disposition with regard to the guardianship of the children in her will. The children had since been cared for by the petitioner's parents, who applied for custody. The respondent consented to the application, and was not represented.

L. V. Ardagh for the applicants.

WILLMER J. In this case application is made by the parents of a deceased petitioner (1.) for leave to intervene in the suit, notwithstanding the death of the petitioner, for the purpose of asking for custody of the children of the marriage between the petitioner and the respondent, (2.) for an order for such custody, and (3.) for certain other relief which does not raise any question of general interest and which will be dealt with by the order of the court. I have adjourned the summons into court for judgment because so much of the application as is concerned with leave to intervene in the suit raises a question under the Supreme Court of Judicature (Consolidation) Act, 1925, which does not appear to have arisen previously for determination by the court.

[The learned judge stated the facts and continued :] It seems obviously desirable in the best interests of the children that an order should be made committing them to the custody of the present applicants, the result of which will be no more than to give legal effect to the existing arrangement.

The question has been raised, however, whether I have power to make such an order in the present proceedings. My attention has been directed to a statement in Rayden on Divorce, 4th ed., p. 454, ch. XII, s. 70, where it is said that : " Such an application (that is, to intervene on a question of " custody) cannot be made by a third party after the death " of a petitioner judicially separated from her spouse "— and it may be said that a fortiori it cannot be made in the case

" parents was the subject of the " decree, or for placing such chil- " dren under the protection of the " court of chancery, as might have " been made by such final decree " or by interim orders in case the " proceedings for obtaining such " decree were still pending . . . . "

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when the marriage of the deceased petitioner has been dissolved. The authority cited for the statement in the text is the case of *Davis* v. *Davis* (1). A similar statement, and a reference to the same case, is made in Latey on Divorce, 13th ed., p. 236, note (*g*). In that case Butt J. refused to accede to an application by the mother of a deceased petitioner in circumstances precisely similar to those of the present case.

The application in *Davis* v. *Davis* (1) was made under s. 4 of the Matrimonial Causes Act, 1859, now repealed and replaced by s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925. It is instructive to compare the wording of the repealed section with that of the section now in force. Under s. 4 of the Act of 1859 it was provided as follows, omitting irrelevant and unnecessary words: "The "court, after a final decree of judicial separation, nulity of "marriage, or dissolution of marriage, may. . . . make, from "time to time, all such orders and provisions with respect to "the custody . . . . of the children the marriage of whose "parents was the subject of the decree, ... as might have "been made by such final decree or by interim orders in case "the proceedings for obtaining such decree were still "pending . . . ." Butt J. held in *Davis* v. *Davis* (1) that this section referred only to an application to be made by one of the parents, and did not contemplate an application being made by a stranger.

The words of s. 193, sub-s. 1, of the Act of 1925 are, in my judgment, significantly different. Under that sub-section it is provided as follows: "In any proceedings for divorce or "nullity of marriage or judicial separation, the court may "from time to time, either before or by or after the final "decree make such provision as appears just with respect to "the custody, maintenance and education of the children, the "marriage of whose parents is the subject of the proceedings." It will be seen that the words of the old section limiting the power of the court to such orders "as might have been made" by final decree or by interim orders in the proceedings have not been reproduced in the present section: on the contrary the court is given power, at any time, to "make such "provision as appears just." I see nothing in the present section to prevent me from doing that which, under the old section, Butt J. held that he had no power to do, subject to my being satisfied, as I am, that the application by the parents

(1) (1889) 14 P. D. 162.

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of the petitioner is just, that is, in the best interests of the children. In my judgment, the decision in *Davis* v. *Davis* (1), being founded on the wording of the repealed section of the Act of 1859, is no longer authoritative, and the statements in the text-books, to which I have drawn attention, are erroneous having regard to the wide powers now conferred by s. 193, sub-s. 1, of the Act of 1925. For these reasons I accede to the present application. The applicants will have leave to intervene in the suit, and on their application I grant them the custody of the two children of the deceased petitioner.

Solicitors: *Moodie, Randall & Carr, for Boutwood, Simpson & Co., Leighton Buzzard.*

(1) 14 P. D. 162.

J. B. G.

istinguished. BARKWAY *v.* SOUTH ALES TRANSPORT CO., LTD. [1948] All E.R. 460.

Distinguished. BARKWAY *v.* S. WALES ETC. [1949] 1 K. B. 54

EDMONDS *v.* EDMONDS.

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Feb. 17, 18.

Lord Oaksey, Morton and Asquith L.JJ.

Divorce — Procedure — Evidence — Husband's petition — Bastardy proceedings in India by wife against co-respondent—Document recording evidence before commissioner and correspondence produced in Indian proceedings—Admissibility—Evidence Act, 1938 (1 & 2 *Geo.* 6, *c.* 28), *s.* 1, *sub-s.* 1 (i.) (*b*).

A husband petitioner's case was that his wife had committed adultery with the co-respondent in India, against whom she had there instituted bastardy proceedings, in which final judgment was still pending. By a summons taken out under r. 25 of the Matrimonial Causes Rules, 1944, the husband sought an order for the admission in evidence at the trial of his petition of certain documents put in in evidence in the Indian proceedings, namely, certain correspondence and a statement sworn before a commissioner, by which documents it was intended to prove the birth of the child and that the co-respondent was its father. On appeal from a refusal of Wallington J., to make an order that the evidence in question should be admitted, and from his order adjourning the question of admissibility for the judge at the trial of the petition :—

Held (1.) that as it was desirable in the interests of justice that the husband should know in advance what evidence he would be able to adduce at the trial of his petition, an order should be made in advance on his summons for the admission of the evidence if it were otherwise admissible; (2.) that evidence sworn before a commissioner or, *semble*, a judge, was information recorded within

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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the meaning of s. 1, sub-s. 1 (i.) (*b*) of the Evidence Act, 1938 (1); (3.) that duly authenticated copies of the documents in question would be admissible on the refusal of the court in India to surrender the originals; and (4.) that the husband was entitled to an order in advance that those copies should be admissible although they were not yet in existence.

APPEAL from Wallington J. in chambers.

The appellant, in his petition for divorce on the ground of his wife's adultery with the co-respondent while she was in India, took out a summons under r. 25 of the Matrimonial Causes Rules, 1944, for proof of facts by the production of certain documents. The summons was contested by the co-respondent.

The husband's case was that while the wife was living in India she committed adultery with the co-respondent and had a child by him. Before the husband filed his petition, the wife, as guardian of the child, had instituted proceedings against the co-respondent in India claiming a declaration that he was its father and an order for its maintenance. In those proceedings, final judgment in which had not yet been pronounced, the wife and others gave evidence, and correspondence was produced, to establish the birth of the child and the fact that the co-respondent was its father.

The husband by his summons sought permission to adduce in evidence authenticated copies of (*a*) the evidence given in the Indian proceedings by a Mrs. Ingles in the form of a statement sworn before a commissioner and transcribed and signed by him, and (*b*) the correspondence in question.

Wallington J. refused the order asked for and adjourned the

(1) By s. 1, sub-s. 1, of the Evidence Act, 1938: "In any civil "proceedings where direct oral "evidence of a fact would be "admissible, any statement made "by a person in a document and "tending to establish that fact "shall, on production of the "original document, be admissible "as evidence of that fact . . . . "(i.) if the maker of the statement "either—(*a*) had personal knowledge of the matters dealt with "by the statement; or (*b*) where "the document in question is or "forms part of a record purporting "to be a continuous record, made "the statement (in so far as the "matters dealt with thereby are "not within his personal knowledge) in the performance of "a duty to record information "supplied to him by a person "who had . . . . personal knowledge of those matters; and "(ii.) if the maker of the statement "is called as a witness in the "proceedings."

whole matter for decision by the judge at the trial of the petition.

The husband now appealed.

Theodore Turner K.C. and *Fairweather* for the husband.
Levy K.C. and *R. T. Barnard* for the co-respondent.

LORD OAKSEY L.J. The question at issue on this appeal concerns the construction of s. 1, sub-s. 1 (i.) (*b*) of the Evidence Act, 1938, and r. 25 of the Matrimonial Causes Rules, 1944. The documents which the petitioner wishes to put in as evidence by copies are, first, a statement on oath by a Mrs. Ingles given in proceedings in India, and, secondly, letters alleged to have been written by the co-respondent which were produced as evidence in the proceedings in India. There was no indication before Wallington J. or before this court that the copies which are before us are properly authenticated copies of the documents which were produced in the proceedings in India. Apart from the question of the admissibility of the evidence, the question arises whether it is fair and desirable in the interests of justice that the petitioner should at this stage be in a position to know what evidence he will be able to adduce at the trial. In my opinion it is highly important to him that he should know at this stage whether he will be allowed to produce (*a*) the document which contains Mrs. Ingles' sworn statement, and (*b*) the letter which, it is said, she swore that she wrote. The question of the weight of that evidence given by Mrs. Ingles will be entirely for the judge, and I, of course, express no opinion on it.

The next question is whether this evidence is admissible under the Evidence Act, 1938. [His Lordship read s. 1, sub-s. 1.] It is sought to put in the statement of the commissioner who took down the evidence of Mrs. Ingles, which is said to tend to establish the facts of which Mrs. Ingles spoke on oath. It is contended for the co-respondent that the words in s. 1, sub-s. 1 (i.) (*b*) " in the performance of a duty to record " information " are totally inapt to describe evidence before a commissioner or, I suggest, before a judge. In my opinion, although those words are wide enough to cover other forms of information which may be supplied, they still are apt to cover the evidence given by a witness either before a commissioner or before a judge. Such evidence is simply a form of information supplied to a commissioner or to a judge, to whom it is given on oath and under the solemnity of legal proceedings.

It appears that the Indian court is not prepared to part with

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the original documents which have been put in in proceedings before it. Therefore, it will be necessary for the husband to rely on s. 1, sub-s. 1 (i) (*b*), and produce properly authenticated copies of those documents. It is argued for the co-respondent that up to the present there are in existence no properly authenticated copies of the documents. Nevertheless, as it is a matter of importance to the husband to know the position in which he stands and whether he can make use of the documents in question, it is proper, in my opinion, to make an order in advance that if properly authenticated copies of these documents are produced they should be admitted in evidence. It is not necessary to discuss r. 25 of the Matrimonial Causes Rules, 1944, because I am of opinion that, as was contended for the co-respondent, that rule could not go beyond the terms of the Evidence Act, 1938, itself. It was conceded by leading counsel for the husband that certain parts of the evidence given by Mrs. Ingles were or might be hearsay. He does not desire to adduce those parts in evidence. [His Lordship referred to the agreement between counsel as to the parts of the evidence which it was sought to adduce, and continued :] With reference to the correspondence, it is argued for the co-respondent that if photostatic copies of it coupled with evidence as to the handwriting of the co-respondent are produced it will at once be admitted by the court. There again, however, it is of importance to the husband that he should know the fact as soon as possible, and I am therefore of opinion that an order should now be made that if properly authenticated copies in photostatic form of these letters are produced, the husband should be entitled to make use of them at the trial. In my opinion, therefore, the appeal should be allowed.

MORTON L.J. I agree. My Lord has referred to "properly "authenticated copies" of certain documents. I think that it would be convenient that the precise form which such authentication is to take should be stated in our order, so that the parties may know exactly what is required in this respect.

ASQUITH L.J. I agree.

Appeal allowed.

Solicitor for the husband : *J. B. de Fonblanque.*
Solicitors for the co-respondent : *Kimber Bull & Co.*

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Mar. 12.

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Divorce — Practice — Naming adulterer — Making named adulterer co-respondent—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 177—*Matrimonial Causes Rules,* 1944, *r.* 5—*Discretion of the court—Principles to be applied.*

Where an application is made by a husband petitioner for leave to proceed with his petition without naming the alleged adulterer or making him a co-respondent, the burden is on the petitioner to make out his case for relief, and the public interest must be the paramount consideration.

Mere proof of hardship to the parties is not enough by itself to constitute "special grounds" for relief within s. 177 of the Supreme Court of Judicature (Consolidation) Act, 1925 unless the petitioner can also satisfy the court that the risk of presentation of a false case, or of other injury to the public interest, is so small as to be almost negligible.

Circumstances which the court may properly take into consideration in exercising its discretion in similar cases enumerated and applied.

SUMMONSES adjourned into court.

The two applications before the court were by husband petitioners for leave to proceed with their petitions without naming the alleged adulterers. In both cases it was sought to prove adultery by furnishing evidence that the respondent had given birth to a child at the date of whose conception the petitioner was on military service overseas ; in both cases the name of the alleged adulterer had been furnished by the respondent, but in neither was the petitioner acquainted with him nor, it was alleged, could he offer any evidence of the adulterer's guilt.

The facts of the two cases, and the material differences between them, are given in the judgment.

John B. Latey for the petitioners.

Cur. adv. vult.

March 12. WILLMER J. I have before me two applications by husband petitioners for leave to proceed with their petitions without naming the alleged adulterers. Both cases are of a type which is now common in this court ; for in both it is sought to prove the alleged adultery by furnishing evidence (*a*) that the

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respondent wife has given birth to a child, and (*b*) that the petitioner was at all material times absent on military service overseas, so as to preclude the possibility of his being the father of the child.

In each case the name of an alleged adulterer has been furnished by the respondent, but in neither case is the petitioner acquainted with him, and in both it is said that it will not be possible for the petitioner to offer any evidence of the adulterer's guilt. It is in these circumstances that the petitioners ask to be relieved of the obligation of naming the alleged adulterer. So much is common to both cases, but there are, as I think, material differences between the facts of the two cases, to which I will refer in a moment. The cases have been referred to me by the learned registrar before whom they came in the first instance, because (so I was informed), there is a large number of similar cases now awaiting decision, and it was hoped that my decision in these two cases might afford some guidance in dealing with the other cases. In view of the importance of the matter I thought it right to call for argument in open court, and I have taken time to consider my decision.

The applications are made under s. 177 of the Supreme Court of Judicature (Consolidation) Act, 1925 (1), the material words of which are as follows: "On a petition for divorce presented "by the husband . . . . the petitioner . . . . shall make the "alleged adulterer a co-respondent unless he is excused by the "court on special grounds from so doing." It is also necessary to refer to r. 5 of the Matrimonial Causes Rules, 1944, which provides as follows, again omitting immaterial words: "Unless "otherwise directed, where an alleged male adulterer is named "in a husband's petition for divorce . . . . such alleged "adulterer shall, if living at the date of the filing of the "petition, be made a co-respondent in the case . . . ."

It will be noticed that the Act is silent about naming an alleged adulterer. Rule 5 provides in terms only for the case of an adulterer who is named, and there is no provision in the rules dealing in terms with the case of an unnamed adulterer. It is well settled, however, that the expression "alleged

(1) Supreme Court of Judicature (Consolidation) Act, 1925, s. 177: "(1.) On a petition for "divorce presented by the hus- "band or in the answer of a "husband praying for divorce "the petitioner or respondent, "as the case may be, shall make "the alleged adulterer a co- "respondent unless he is excused "by the court on special grounds "from so doing."

"adulterer," as used in the Act, includes not only a named adulterer but also one whose name and identity may be unknown to the petitioner. It has accordingly been held in the recent case of *Eastham* v. *Eastham* (1), that where the name of the alleged adulterer is unknown it is still necessary for the petitioner to ask the court for leave to proceed without naming the adulterer. In other words it is necessary to seek the decision of the court on both questions, namely (*a*), whether the petitioner is to have leave to proceed without naming an adulterer, and also (*b*), whether an adulterer who has been named is to be made a co-respondent.

It is clear both from the terms of the Act itself and from the decisions under the corresponding section of the Matrimonial Causes Act, 1857 (2), that the question to be decided is one for the discretion of the court. It is, therefore, impossible to lay down any rule which will be of general application, and in *Saunders* v. *Saunders* (3) the Court of Appeal expressly decided that any attempt to do so would be wrong. Each case must be decided on its own merits, and I wish to make it clear that nothing which I say in this judgment is intended in any way to lay down any general rule which might fetter the discretion of the court in any future cases.

I think, however, that it is both permissible and useful to state what considerations I have attempted to bear in mind in arriving at my decision in the present cases, and what are the circumstances which the court may properly in my judgment take into consideration in exercising its discretion in similar cases.

Mr. Latey was careful to confine his argument to those cases in which the incontrovertible facts raise something in the nature of an irresistible inference that adultery has been committed, and in which (as in the present cases), the petitioner, apart from the confession of the respondent, has no evidence whatever as to who the adulterer was. He contended that in such cases to insist upon the alleged adulterer being named in the petition, and still more to insist upon his being made a co-respondent, would have the effect of inflicting grave hard-

(1) [1943] P. 53.

(2) Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85), s. 28: "Upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent to the said petition unless on special grounds, to be allowed by the court, he shall be excused from so doing; . . . ."

(3) [1897] P. 89.

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ship not only upon the petitioner but also upon the proposed co-respondent. The petitioner would be put to the expense of proceeding against a man against whom he would have no chance of succeeding, with the added danger of being condemned in costs in case the alleged adulterer saw fit to defend and assert his right to be dismissed from the proceedings. As to the alleged adulterer, it was pointed out that he might well be himself a married man, and that the only effect of naming him in proceedings which were bound to be abortive as against him might be to precipitate the break-up of two homes instead of one. Mr. Latey conceded that in addition to considering the parties the court must also bear in mind the public interest in minimizing the risk of any collusive design to present a false case, and contended that the duty of the court was to strike a just balance between the necessity of safeguarding the public interest on the one hand and the avoidance of unnecessary hardship to the parties on the other. But he argued that in cases such as those now before the court the risk of a false case being presented was reduced almost to vanishing point, and that any public advantage to be gained from naming the alleged adulterer would be far outweighed by the hardship which might be caused to the parties. Mr. Latey further pointed out that the court, in exercising its discretion on this matter (as on any other), should pay due regard to the contemporary conditions and to the present day needs of the community; and he appeared to suggest that the fact of the prevalence of this type of case at the present time might itself afford good reason for some relaxation of the practice of the court in favour of petitioners.

The reports are full of cases in which applications similar to that in the present case have been made. I need not refer to the earlier decisions, for in the year 1896 all the previous authorities were reviewed in *Jones* v. *Jones* (1) where many of the essential facts were similar to those of the present cases. In that case Gorell Barnes J. sought to lay down a rule, which he expressed in the following terms (2): "I am of opinion that, where the "relief sought against the respondent is on the ground of adul- "tery alleged to have been committed with a man, whose name "and identity are known, and who is alive, the petitioner must "make such person a co-respondent, and that the court ought "not to excuse him from so doing, merely because he finds that "he cannot obtain evidence, which will prove his case as against

(1) [1896] P. 165. (2) Ibid. 170.

"such co-respondent." In the particular case the learned judge was not satisfied that the petitioner could not obtain evidence against the alleged adulterers, and he refused the application.

In the following year the Court of Appeal, in *Saunders* v. *Saunders* (1), while not disagreeing with the actual decision in *Jones* v. *Jones* (2), expressed their disapproval of the rule laid down by Gorell Barnes J. on the ground that such a rule would act as a fetter on the discretion of the court; they insisted that the court must apply its mind to each particular case and decide, on the facts of the particular case, what it was just and expedient to do, being guided by the statute, the Rules of Court, and what experience shows to be the dangers to be avoided.

Later in the same year, *Edwards* v. *Edwards* (3), another similar case, came before the court, and Sir Francis Jeune P., took the opportunity of commenting on and to some extent explaining the two previous decisions. He pointed out that there are many cases where the facts are so clear as hardly to call for the exercise of the court's discretion. Thus, where the alleged adulterer is dead, or is actually unknown, for example because he has escaped and cannot be found, the court can in practice do no other than grant leave to proceed without a co-respondent. On the other hand, where the alleged adulterer is a known person whom the petitioner believes to be guilty, the court can in practice do no other than insist upon his being made a co-respondent. The real difficulties, calling for the exercise of the court's discretion, arise in the intermediate class of case where the evidence points to a known man whom, however, the petitioner states he cannot prove, and does not believe, to be guilty. Sir Francis Jeune suggests that the mere belief of the petitioner that the alleged adulterer is not guilty cannot by itself be sufficient to excuse his being made a co-respondent; but that if the petitioner can go further, and satisfy the court that no evidence can be obtained against the man accused, then there may be a case for relieving the petitioner from making him a co-respondent.

I doubt whether anything more is to be collected from the authorities, but I must just mention one more case which was cited to me, if only to say that I think it must be misreported. This is *Gleed* v. *Gleed* (4), which was before Lord Merrivale P., in the year 1927. The wife had supplied the name of the alleged adulterer, but his identity and whereabouts were unknown, and

(1) [1897] P. 89.
(2) [1896] P. 165.
(3) [1897] P. 316.
(4) (1927) 43 T. L. R. 678.

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he was believed to be somewhere in Australia. According to the report, Lord Merrivale P. gave leave to proceed without making the alleged adulterer a co-respondent. The facts disclosed were so strikingly similar to those of one of the cases now before me that I thought it would be useful to examine the actual record of the case. Having studied the file I find that the alleged adulterer was in fact named and made a co-respondent, and the real question before the court, and the only question, was whether leave should be granted to dispense with service upon him. I do not think, therefore, that this decision helps me very much in dealing with the present applications.

In my judgment the wording of the Act makes it clear that it is for the petitioner to make out his case for relief from naming the alleged adulterer and making him a co-respondent. Unless the petitioner discharges the burden which is upon him, by showing " special grounds," the Act requires that the alleged adulterer be made a co-respondent. The burden must be discharged on the facts of the particular case, and I do not at all assent to the proposition that the mere fact of the prevalence at any particular time of a particular class of case affords any valid reason for relaxing in favour of petitioners the plain requirements of the Act. The court must be satisfied upon the facts of each particular case that special grounds exist. While I agree with counsel for the petitioners that the duty of the court is to strike a balance between the need for safeguarding the public interest on the one hand and for avoiding unnecessary hardship to the litigants on the other, I desire to leave no doubt that in my judgment the public interest is the paramount consideration. In other words I do not think that mere proof of hardship to the parties is enough by itself to constitute ' special grounds," unless the petitioner can also satisfy the court that on the facts of the particular case the risk of presentation of a false case, or of other injury to the public interest, is so small as to be almost negligible.

In pursuance of these general observations it seems to me that the following are the sort of questions that the court may well ask itself in each particular case :—

(1.) Is there any ground for suspecting that a false case is being presented ? In the ordinary type of non-access case, upon proof of the essential facts, that is the birth of a child coupled with proof of the absence of the petitioner overseas at the material time, no room is left for doubt that adultery has in fact been committed. But the possibility remains that

husband and wife may have entered into a collusive bargain to conceal the identity of the real adulterer, or the wife may be deceiving her husband by accusing an innocent man so as to cloak the identity of the real adulterer. Obviously the probability of collusion between the parties diminishes the longer the absence of the petitioner overseas has been, but if there remains any reasonable doubt as to the truth of the wife's accusations against the alleged adulterer, to name him and make him a co-respondent clearly provides some safeguard in the public interest.

(2.) Is there any ground for suspecting that the petitioner has connived at the adultery of his wife? The mere fact that he is proved to have been overseas at the time of the alleged adultery is clearly not sufficient by itself to negative the possibility that he may have connived at it. But equally it is clear that the longer the petitioner's absence overseas has been the less likelihood can there be of his having connived at his wife's adultery.

(3.) Has the petitioner in fact taken all reasonable steps to see whether evidence against the alleged adulterer can be obtained? Where nothing but the name of the alleged adulterer has been disclosed, and the petitioner has no knowledge of any such person, it may well be that no further steps are open to the petitioner to obtain evidence against him. But where the wife discloses both the name and address of the alleged adulterer, it seems to me that she discloses the identity of the man accused, unless upon further inquiry it appears that no such person exists. Where the identity of the alleged adulterer has been so disclosed, it is clear that the petitioner has scope for further inquiry, since evidence may be obtained as to the movements and behaviour of the alleged adulterer at the material time. Still more is this the case when the time and place of the alleged adultery has been disclosed. Unless it appears that reasonable steps to obtain evidence have in fact been taken, it appears to me that no case for dispensing with making the alleged adulterer a co-respondent has been made out.

(4.) What is the hardship that the petitioner will suffer if the court insists upon the alleged adulterer being made a co-respondent? Various hardships have been suggested. (*a*) The petitioner may be put to further, and possibly abortive, expense in endeavouring to obtain evidence against the alleged adulterer. It seems to me that the hardship of incurring this expense must be weighed against the probability or otherwise

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of its being fruitful. In other words I do not think that a petitioner can be required to do more than is reasonable in the circumstances of the particular case. (*b*) The petitioner may incur a liability for costs in the event of the alleged adulterer, upon being made a co-respondent, appearing and asserting his right to be dismissed from the proceedings. I am not unduly impressed by this alleged hardship. It seems to me that this is one of the risks which any petitioner must accept when he elects to institute proceedings. (*c*) Since the petitioner must swear an affidavit verifying, to the best of his belief, the allegation in his petition, he may be forced by the court into a position where he must either abandon the proceedings or else swear to the truth of something which he does not genuinely believe to be true.

This, I feel, is a point of some substance, but I do not see why it cannot be overcome by allowing, in a proper case, some degree of elasticity in the wording of the charge in the petition. Where the court is not satisfied that reasonable inquiries have been made by the petitioner for the purpose of obtaining evidence against the alleged adulterer, I do not see how the petitioner suffers any hardship in being forced to abandon his proceedings if he cannot conscientiously swear to his belief in the truth of the allegation in his petition. But where, after diligent inquiries, the petitioner is left in the position that he still has nothing whatever to go on beyond what the respondent has told him, I see no reason why he should not be allowed to say so in his petition, that is to accuse the respondent, for instance, of adultery " with a man whose name is stated by the " respondent to be so and so but whose identity is unknown " to the petitioner," or whatever form of words may be suitable to the facts of the particular case. In such a case it seems to me that the petitioner would have strong grounds for asking the court for leave to proceed without making the alleged adulterer a co-respondent.

(5.) Lastly, the court may properly, I think, ask itself whether any unnecessary hardship will be imposed on the alleged adulterer by naming him and making him a co-respondent. Consideration can be properly given to the question whether, if he is a married man, the effect of naming him may not be merely to precipitate the break-up of another marriage. But against this it is to be remembered that if he is in fact an innocent man it is rather to his interest to be made a co-respondent, so that he may have the opportunity of coming forward to vindicate

his character. Moreover, the court must never lose sight of the possibility that the man named by the respondent may be merely a cloak to conceal the identity of the real adulterer, in which event the best chance of ascertaining the truth may well lie in making the alleged adulterer a co-respondent, so as to give him a chance of defending the proceedings, and exposing the falsehood of the respondent's allegation.

Bearing these considerations in mind, I proceed now to consider the facts of the two cases actually before me. In the case of Sage it is alleged that a child was born on June 6, 1945 ; and admissible evidence will be given to show that the petitioner was serving overseas from May, 1940, until May, 1945. There was thus a prolonged period of non-access before the date when the child must have been conceived. The respondent has made a written confession, in the course of which she gives the name of the alleged adulterer, but states that he is a Canadian and that she does not know his address. She does not admit to any cohabitation with this man, but states that the adultery took place upon one occasion in the interval of a dance which both were attending. The petitioner's solicitor has sworn an affidavit, in the course of which he says that he cannot think of any inquiries which might be made with a view to ascertaining the identity of the alleged adulterer.

On these facts I see no hope of ascertaining the identity of the alleged adulterer or of obtaining evidence against him. With so prolonged a period of non-access I think that the possibility of collusion between the petitioner and the respondent or of connivance on the part of the petitioner can be altogether disregarded. In the circumstances I give leave to proceed without making the alleged adulterer a co-respondent. Since a name has been furnished by the respondent I do not think it would be right to dispense with naming the alleged adulterer, but I think it would be quite proper for the petition to allege that the respondent " committed adultery " with a man whose name is stated by the respondent to be " A.B. but whose identity is unknown to the petitioner."

In the case of Stockbridge it is alleged that a child was born on July 13, 1945, and admissible evidence will be given to show that the petitioner was overseas from March, 1943, until after the date of the birth of the child. In this case, therefore, there was a period of about eighteen months of non-access before the date when the child must have been conceived. In such circumstances I think that the probability of collusion or

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connivance is extremely slight, but that it cannot be completely disregarded as in the case of Sage. In this case also the respondent has disclosed in writing the name of the alleged adulterer. But she has also gone further and given his address which is an address in Birmingham. She states that she did not actually cohabit with this man, but that adultery took place at an address in Sussex on a number of occasions over a period when she was in lodgings at that address while working on the land. She is unable to furnish the name and address of any witness who can speak of the association. In these circumstances it is said that the petitioner cannot obtain any evidence against the alleged adulterer ; but there is nothing to show that any effort to do so has in fact been made, beyond asking the respondent. In this case the petitioner knows not only the name of the alleged adulterer, but also his address, that is, his identity. The person so identified is resident in this country, and must presumably be known to persons who may be able to speak of his movements and behaviour during the material period. Moreover, the petitioner knows the address where it is alleged that adultery was habitually committed. He thus has two possible lines of inquiry, which have so far not been tried. I am not satisfied in the circumstances that in this case all reasonable efforts have been made to obtain evidence against the alleged adulterer. I do not think, therefore, that in this case it would be right to give leave to dispense with making the alleged adulterer a co-respondent, still less to dispense with naming him altogether.

For these reasons I allow the application in Sage's case, to the extent of dispensing with making the alleged adulterer a co-respondent, but dismiss that in the case of Stockbridge.

Solicitor (for both applicants) : *A. M. V. Panton* (*Services Divorce Department*).

J. B. G.

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Shipping — Collision — Total loss — Measure of damages — Future trading profits—Government time charter—Terminable at will of charterers—Certainty of continuous employment—Future trading profits—Reflected in market values of comparable ships.

On a reference to assess the damages sustained by the owners of a vessel totally lost in a collision with another vessel the sum

of 22,900*l.* under one item of claim which was based on the market value of the vessel at the time of her loss, was allowed.

Under a second item the owners claimed 20,269*l.* 13*s.* 4*d.* in respect of loss of trading profits based on the fact that the vessel was engaged for a long undefined term under a government charter and was certain of profitable employment during hostilities, and the sum of 4,500*l.* was allowed. On an objection by the defendants to the allowance under item 2 :—

Held, that the sum allowed under the first item was based on prices paid in the market for comparable ships and included any sum to which the plaintiffs might have been entitled in respect of enhanced value owing to the virtual certainty of future profitable employment. The loss to the plaintiffs was already reflected in those prices and, therefore, the plaintiffs were not entitled to recover in respect of trading profits more than such profit as the vessel would have made if the voyage on which it was engaged at the time of its loss had been completed.

The Philadelphia [1917] P. 101, and *Liesboch Dredger* v. *Edison S.S.* (*Owners*) [1933] A. C. 449 discussed.

MOTION in objection to the assistant registrar's report on a reference to assess damages.

The claim in the reference arose out of a collision during the 1939–45 war between the plaintiffs' steamship *Presto* and the defendants' steamship *Llanover* as a result of which the *Presto* sank. In July, 1945, the House of Lords decided that the *Llanover* was solely to blame.

At the time of her loss the *Presto* was on a coastal voyage under charter to H.M. Government (T.99a) by cl. 1 of which the owners agreed to let and the charterers agreed to hire the *Presto* for such period as the charterers might require but unless " otherwise agreed not extending beyond the expiration " of six months from the cessation of hostilities." It was agreed between the parties before the assistant registrar that the net daily profit of the *Presto* was 12*l.* There was evidence that there was no substantial difference in the profit whether a vessel of the *Presto* class was engaged under government charter or was a " free " ship.

The assistant registrar allowed in respect of the market value of the *Presto* at the time of her loss 22,900*l.*, and for loss of trading profits the sum of 4,500*l.* with interest at 4 per cent., on the loss of profits as from the date of collision.

Further material facts are fully stated in the report of the assistant registrar which is referred to in detail in the judgment.

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The defendants appealed against the allowance in respect of loss of trading profits.

R. F. Hayward K.C. and *Vere Hunt* for the defendants. The report of the assistant registrar should be varied and the objection allowed because he had over-ruled himself in the decision given in *The Baron Pentland* in 1941. He had departed from a fundamental principle that damages cannot be given twice over by allowing interest at 4 per cent. on the loss of profits as from the date of collision, treating it as the value of the ship as a going concern. The government charter under which the *Presto* was engaged at the time of her loss was one that the charterers could have terminated at their will after the completion of any current voyage. It was not a time charter in the strict sense, and the only loss of trading profits that the owners were entitled to was the profit they would have made had she completed the short voyage on which she was engaged at the time of her loss. The principle is clearly stated in the head-note in *The Philadelphia* (1) :— "The measure of "damage in the case of the total loss by collision of a "vessel under charter is the value of the vessel at the time "of her loss, plus the proper sum for freights or profits "at the end of the voyages fixed by her existing "charters, subject to proper deduction for contingencies and "wear and tear." In cases like the present a clear line of demarcation has been drawn by the authorities between damages which are clearly recoverable and those which are too remote.

K. Carpmael K.C. and *J. B. Hewson* for the plaintiffs. The charterparty in question contemplates in its terms that the ship would be continuously employed for an unpredictable term. That contingency would have to be taken into account when considering the question of damages and the assistant registrar has properly taken that into consideration. The principle established by the authorities is that in a long time charter the amount would be larger than in a short or shorter voyage charter (see *The Philadelphia* (1) per Swinfen Eady L.J. at pp. 108 and 111).

There must be an actual engagement. A fishing vessel can only recover her value at time of loss and fish already caught. There cannot be a claim for fish which she would contingently have caught had she not been sunk. There is all the difference

(1) [1917] P. 101.

between an actual engagement in which a vessel is on and the speculative value of some future engagement such as, for instance, fishing. The authorities establish that the vessel must have a firm engagement. The *Presto* had a firm engagement which brought her completely within that category of cases. The report of the assistant registrar ought to be upheld.

Hayward K.C. in reply.

Cur. adv. vult.

April 18. PILCHER J. After stating the preliminary facts, said: At the reference the plaintiffs formulated the two first items of their claim as follows: (1.) Market value of the steamship *Presto* at the date of her loss; (2.) Loss of trading profits.

Under item 1 the plaintiffs claimed 25,000*l.* and were allowed 22,900*l.* Under item 2 they originally claimed 20,269*l.* 13*s.* 4*d.* The learned assistant registrar allowed them under item (2.) the sum of 4,500*l.* and it is against the allowance by him of this sum that the defendants now appeal by way of objection to the report.

The facts of the case are fully stated by the assistant registrar in his report, and I cannot do better than quote his words: "In November, 1940, the *Presto* was requisitioned by the "Ministry of War Transport for the South Coast coal convoy "upon the terms of the charterparty known as T.99a and "continued so to run until she was sunk by the *Llanover*. "The contract of hire, though the terms thereof were perfectly "well understood between the Ministry and the shipowners, "seems never to have been signed by the parties. By cl. 1 of "the charterparty the owners agreed to let and the charterer "agreed to hire the *Presto* for such period as the charterer "might require but unless otherwise agreed not extending "beyond the expiration of six months from the cessation of "hostilities. The rate of hire (cl. 4) was fixed by reference "to the deadweight tonnage of the *Presto* and the parties "agreed before me that the net profit was 12*l.* a day."

"If therefore, the *Presto* had not been sunk and had "continued to run under T.99a for 4 years her owners would "have received as hire-money not the sum of 20,269*l.* 13*s.* 4*d.* "as originally claimed (item 2) but the sum of 17,520*l.*"

After dealing with the dispute as to the market value of the *Presto* under item 1 and arriving at the conclusion that the

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proper sum to allow under this item was 22,900*l.* the assistant registrar proceeded to deal with item 2 which forms the subject matter of this appeal. "As to the loss of trading "profits, the dispute between the parties turned on the "duration of the contract of hire. Mr. Hayward for the "defendants founded his argument on the words of cl. 1 of "the charterparty and urged that as the contract of hire of "the *Presto* was for such period as the charterers might require "there was no fixed contract beyond the voyage on which the "*Presto* was proceeding at the time of her loss and referred me "to the case of *The Baron Pentland* (1941, Fo. 318) (1) in "which I had found that, while it was probable that the "plaintiff's vessel would continue to be employed, there was "no certainty that she would be and had disallowed the "claim in respect of any profits she might have earned after "the completion of the voyage on which she was engaged at "the material time. On the other hand Mr. Carpmael for "the plaintiffs referred me to *The Port Darwin* (1942, Fo. 46) (2) "and *The British Engineer* (1942, Fo. 70) (3), in both of which "I had allowed the claim on the basis of continued and "prolonged employment after the collision voyage.

"The decision in those cases turned upon the facts of each "particular case. So with this case. I had some excellent "evidence from Mr. John William Duncan, a deputy director "of the Ministry of War Transport and liaison officer with the "Ministry of Fuel and Power. He was directly concerned with "the selection and requisition of suitable ships for the South "Coast coal convoy. His evidence, which I accepted, was "that had the *Presto* been afloat she would have continued to "run under charter T.98a or under charter T.99a according "to the service on which she might be engaged, and that so "long as the *Presto* maintained efficiency there was no chance "of her being paid off. 'Efficiency' from the point of view "of the Ministry meant ability to maintain convoy speed. "The convoy speed was 8 knots. The speed of the *Presto* "was 9½ knots, and she would have had no difficulty in "maintaining speed. It was clear, therefore, that although "under cl. 1 of the charterparty the contract of hire was "terminable at the will of the charterer, the *Presto* was "nevertheless in fact certain of employment under one or "other of the Ministry charters so long as she was afloat.

(1) Unreported.
(2) Unreported.
(3) Unreported.

"There was no great difference in the net gain to the ship-owner under whichever charter the ship operated. Acting on the evidence of Mr. Duncan I treated the *Presto* as a ship under a long-term charter and after making deductions for contingencies and for wear and tear assessed the loss of profits at the sum of 4,500*l.*

"The market value of 22,900*l.* with the loss of profits amounting to 4,500*l.* make up a total of 27,400*l.* which, in my opinion, was the value of the *Presto* to her owners as a going concern as at the time and place of her loss."

The motion in objection to this report first came before me on February 13, 1947. Mr. Hayward repeated the arguments which he had addressed to the learned assistant registrar and stressed the point that, as under the terms of charter T.99a the charterers had an option to put the vessel off hire without reason given whenever they chose to do so, the engagement under which she was running was not of such a character as to entitle the plaintiffs to recover anything, whether by way of loss of profit or by way of enhanced value of the ship to her owners, save a very small sum representing the profit which would have been made if the vessel had completed the short coasting voyage on which she was engaged at the time of her loss. This sum Mr. Hayward put, after making a small allowance for contingencies, at 80*l.* I do not think that Mr. Carpmael, who appeared for the plaintiffs, was disposed to quarrel with this sum on the assumption that the other matters which he argued were decided against him.

After the case had proceeded for some little time I felt some doubt whether, quite irrespective of the merits of the point put forward by Mr. Hayward, there might not be another point which would effectively defeat the plaintiffs' claim to recover any substantial sum under item 2. It occurred to me that the sum of 22,900*l.* arrived at by the assistant registrar and accepted by both parties as the market value of the *Presto* at the material time, based as it was upon evidence of sales of comparable ships, probably included any sum to which the plaintiffs might be entitled by way of enhanced value owing to the engagements of the *Presto* on the principles laid down in cases such as *The Philadelphia* (1) and *The Edison* (2). It is common knowledge that in March, 1942, the shipping shortage was acute and whilst no witness had been called at the reference

(1) [1917] P. 101. (2) [1933] A. C. 449.

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to say so it seemed to me more than likely that the market value of a " free " British ship, if any such existed in March, 1942, would not have been less than that of one requisitioned and running under government charter. The learned assistant registrar had no evidence before him as to whether at the time they were sold the comparable vessels spoken to by the valuers were " free " or under government charter. It seemed to me more than likely that in March, 1942, any British shipowner selling or buying a British ship would do so with the knowledge that his ship would, so long as she was kept efficient, be assured of profitable engagement probably at rates laid down by the Ministry of War Transport. If this were so, it seemed to follow that any enhanced value due to the virtual certainty of profitable employment was already reflected in the prices realized by the sales of comparable ships and was therefore already included in the sum allowed by the assistant registrar under item 1. In the course of the argument I indicated to counsel what was in my mind, and suggested either that I should send the case back to the registry in order that Mr. Hayward might have an opportunity of calling additional evidence on this new point or that I should hear such additional evidence myself. Mr. Carpmael objected to the calling of any new evidence, but agreed that if such evidence were called it should be taken before me in order to save some small expense. In the result I adjourned the case in order that Mr. Hayward should consider his position.

On April 15, 1947, the case was restored to the list. Mr. Hayward informed me that he had in court Mr. Bartlett one of the experienced valuers who had given evidence for the defendants at the reference. He also stated that he desired to place before the court certain correspondence which had passed since the original hearing between his professional clients and the Ministry of War Transport. Mr. Carpmael renewed his objection to the hearing of further evidence. Whilst the admission of new evidence which could have been obtained at the time of the original hearing is admittedly undesirable there is no doubt that on a motion in objection to a registrar's report in this Division the court has a discretion to admit such evidence. I am satisfied that it would be quite improper to apply the well-known principles laid down in *The Philadelphia* (1) and *The Edison* (2) for arriving at the value

(1) [1917] P. 101. (2) [1933] A. C. 449.

of a vessel to her owners in case of total loss in the very unusual conditions which prevailed during the recent war without having some authoritative evidence as to what those conditions were. I accordingly decided to hear Mr. Bartlett and to look at the correspondence tendered by Mr. Hayward. Incidentally I should mention that Mr. Carpmael agreed, subject to his general contention that no fresh evidence should be admitted, that the letters received by the defendants from the Ministry of War Transport should be treated as evidence of the facts stated in such letters.

The broad effect of the information supplied by the Ministry can be summarized quite shortly as follows. Some of the comparable vessels, upon whose sale price the value of the *Presto* was arrived at under item 1, were requisitioned under charter T.99a or charter T.98a, the terms of which so far as remuneration was concerned were substantially similar. The remaining comparable vessels were not requisitioned and not running under charter but they were all coasting tramps whose rate of freight was controlled by the Ministry of War Transport in such a fashion that the net profit to the owners was as nearly as possible the same as that earned if the vessel was requisitioned and running under government charter. The Ministry further stated that it would not have been possible for a coasting tramp, such as the *Presto*, if not requisitioned, to lack full employment during the period March, 1942—April, 1945.

Mr. Bartlett stated that he knew at the time when he was giving evidence at the reference that some of the vessels which he had taken as being comparable with the *Presto* were, and that some were not, requisitioned. He also stated that, in his view, the fact that the type of vessel to which he was referring was in continuous and profitable employment at the time of sale was reflected in the prices paid at the sales to which he spoke. It is not disputed that the sum allowed by the assistant registrar under item 1 as the market value of the *Presto* is a proper one. The only evidence of the market value of the *Presto* was that of ship valuers who based their values upon sales of comparable ships at the material time. I am satisfied that the prices realized at the sales of all these comparable ships were substantially enhanced by the fact that all parties concerned with the sales knew that the ships sold were virtually certain of continuous remunerative employment during the period of hostilities either under government charter or at the

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controlled rate of freight for that class of ship, the owners' profit in each case being substantially the same. It follows that the sum allowed by the assistant registrar under item 1 being based as it is upon the prices realized at these comparable sales, includes any sum to which the plaintiffs might have been entitled under the principles laid down in *The Philadelphia* (1) and *The Edison* (2).

There is a good deal to be said for Mr. Hayward's argument that the principles applied in these cases could not in any event govern the present case in view of the fact that the Ministry were free at any moment to cancel the charter under which the *Presto* was running at the time of her loss. Inasmuch however as the assistant registrar had before him evidence that the *Presto* was certain of continuous profitable employment under goverment charter until the termination of hostilities, I prefer not to decide the case on this ground. It is now clear that there is no room in this case for any claim under item 2, save as to the few days which it would have taken the *Presto* to complete the voyage from Blyth to Dover on which she was engaged at the time of her loss. It is not disputed, I understand, that a proper sum to award the plaintiffs under this head is 80*l.*

I accordingly find that the *Presto* was worth to her owners at the time of her loss the sum of 22,980*l.* Upon this sum the plaintiffs are entitled to interest at the usual rate as from the date of the loss until payment.

Objection allowed.

Solicitors for the plaintiffs : *Holman, Fenwick & Willan.*
Solicitors for the defendants : *Thomas Cooper & Co.*

(1) [1917] P. 101. (2) [1933] A. C. 449.

H. G.

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Jan. 15, 16.
Hodson J.

Divorce — Damages — Adultery revived by subsequent desertion — Revival of co-respondent's liability for damages—Subsequent offer to return—Liability and revival of adultery remain.

A husband condoned his wife's adultery with the co-respondent, which was revived by her subsequent desertion. The wife shortly afterwards made an offer to return :—

Held, that if the condonation went, it went for all purposes, and the co-respondent must consequently pay damages; that even if the respondent remained in a state of desertion for only a few days, she did not cancel the revival of the adultery by making an offer to go back to her husband.

HUSBAND'S PETITION for divorce on the ground of his wife's adultery. The suit was defended by the co-respondent on the issue of damages only.

The petitioner filed a petition, dated November, 1945, on the ground of his wife's adultery with the co-respondent. The adultery was condoned, and the petition accordingly dismissed on January 2, 1946. On January 11, 1946, the respondent deserted the petitioner, who presented a second petition, dated January 17, 1946, relying on the decision in *Beard* v. *Beard* (1), as to the revival of adultery. Shortly afterwards the respondent made an offer to return. The co-respondent relied on the condonation, admitted one act of adultery in 1945, and denied that the petitioner had suffered any damage.

Graham Swanwick for the petitioner. Read literally, *Norris* v. *Norris, Lawson and Mason* (2) conflicts with the doctrine of revival. It can be justified as the court was dealing not with damages, but with costs. *Bernstein* v. *Bernstein* (3) was not a case of revival, the adultery with both co-respondents having been committed prior to the condonation of the adultery with one of them. It is authority only for the proposition that if a petition for divorce fails on the ground of condonation, the claim for damages fails with it, because it is ancillary to it. The true principle can be deduced from the relevant statutes, by which the claim for damages is embodied in the petition and is liable to be defeated with the petition by proof of condonation. It is a temporary bar, erected by statute, and when the bar is removed by revival,

(1) [1946] P. 8.
(2) (1861) 4 Sw. and Tr. 237.
(3) [1893] P. 292.

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the petitioner can pursue his remedies as well against the co-respondent as the respondent. This is logical and just as the co-respondent will have had nothing to do with the condonation and cannot complain when his unmerited good fortune comes to an end.

S. E. Karminski K.C. (with him *F. T. Alpe*) for the co-respondent. Once adultery has been condoned the co-respondent is released from his liability for damages. The petitioner has waived his rights against him. *Norris* v. *Norris, Lawson and Mason* (1), *Story* v. *Story and O'Connor* (2), *Bernstein* v. *Bernstein* (3), are well established cases in which this principle has been applied.

HODSON J. This is a petition for divorce presented by Mr. John Sidney Lloyd against his wife, Mrs. Edith Mary Lloyd and against the co-respondent Mr. Hill on the ground of adultery, and the petition contains a claim for damages. The respondent did not defend the case but the co-respondent did. It appeared at the outset that the co-respondent and the respondent were not going to be called, and that the case was going to be argued on the footing that the adultery of the respondent and co-respondent alleged in the petition having been condoned, the claim for damages, and indeed, the whole charge of adultery, must fail, at any rate as against the co-respondent.

The position is this. The parties, having been married in 1936, lived happily together until after the outbreak of the war. When the husband joined the services he and his wife spent as much time together as they could. Eventually in 1943, the husband went to India, and it was while he was in India that his wife met the co-respondent. There was an adulterous desire on the part of the co-respondent towards this woman, which is shown by letters which he wrote to her in the early part of 1944. In the summer of 1945, before the husband came home, the co-respondent opened a greengrocer's shop, the respondent worked in the shop, and they were associating together at that time and thereafter.

In the autumn of 1945, when the husband came home, the co-respondent was actually living in the wife's flat. There is no conclusive proof that she was living there herself, but she spent a great deal of time in it while the co-respondent was

(1) 4 Sw. and Tr. 237.
(2) (1887) 12 P. D. 196.
(3) [1893] P. 292.

there, and admittedly she has committed adultery with him on one occasion: but in view of the evidence it is impossible for me to come to any other conclusion than that adultery was not confined to that single incident. When the husband came home the wife admitted her adultery and he took her back—an indication of the affection which he felt for her, and of the value which he placed upon her. However, as is not unlikely to happen, the name of Hill cropped up between them and words passed, and within a very short time she left her husband. When she left him she left a note: "After last night "I can't go on living with you so I have left. Edie." There had been words between them the night before, and provoked by the way in which she had referred to Hill the husband smacked her face and she left him.

The position at that time was that the husband had already presented a petition for divorce on the ground of her adultery. The date of the petition is November 24, 1945. On January 2, 1946, the petition was dismissed after the parties had come together again, and the adultery had been condoned. But the wife left the husband again. Thereupon another petition was presented, dated January 17, 1946, in which the resumption of cohabitation between the parties was set out, and it was maintained, on the authority of *Beard* v. *Beard* (1), that her walking out on January 11, 1946, amounted to desertion which revived the previous condoned adultery, although the desertion so relied upon had lasted only from January 11 to January 17, 1946, the date when the petition was presented. Nothing else was pleaded; there was no supplemental petition alleging any further adultery, and the co-respondent did not expressly allege condonation, but merely relied on the statement in the petition that they had come together again, and contented himself with admitting one act of adultery in 1945, denying any other adultery, and denying that the petitioner had suffered any damage.

When the case came to be heard it became apparent that it would be the duty of the court to ascertain whether or not condonation existed so as to be a bar to the relief claimed, and that the court at any rate could not be confined to the pleadings. There was a good deal of ground to be covered, because since January, 1946, until to-day many months have passed and a good many things have happened which, it now appears, have a bearing on this question of condonation and

(1) [1946] P. 8.

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revival. Therefore, through their counsel, I invited the parties to investigate these facts on my behalf, indicating that if anything arose in the nature of new matter I would deal with it, if necessary, by adjourning the case so that the new matter might be considered if it came as a surprise. But no application of that kind has been made, and the ground has been covered, not only up to the date of the petition but right up to the date of the hearing, by evidence on both sides. When the situation became plain to the co-respondent's advisers the co-respondent and respondent themselves came and gave evidence, the latter on behalf of the co-respondent. So, as I say, I have had evidence on both sides.

It appears that after the presentation of the petition the association between the respondent and co-respondent has continued, apparently exactly as before. Indeed, when she left her husband on January 11, 1946, she went straight back to Hill's shop and asked to be taken on as an employee by her former paramour, and he took her on. The relationship between them has persisted, so far as the outward eye can see, exactly as it did before. So that here we have two people who have committed adultery together and have had every opportunity of continuing their adulterous association up to the present time ; and I find myself unable to accept their denial when they say that no adultery has taken place since the presentation of this petition, or indeed, since the isolated act which they admit in July, 1945. Therefore, as a matter of law no question of condonation arises, because the adultery having been restarted since the husband and wife came together the petitioner is entitled to say that the adultery referred to in the petition is not condoned. Indeed, if those are the true facts the co-respondent by his counsel does not seek to argue the contrary.

I think perhaps I ought to deal with the case on the footing that the adultery of the respondent and co-respondent has not been established after the date of the petition, because that is the way in which the case was pleaded. I need express no opinion as to the interesting proposition advanced by Mr. Swanwick on behalf of the petitioner, that even if the adultery was not established yet the continued association, the flagrant association, almost in the face of the petitioner, which the respondent had carried on with the co-respondent after the petition had been presented would in itself be sufficient, or might in itself be sufficient, to revive the condoned adultery.

Going back to the pleadings as to this desertion, I find, if it

be necessary so to find, that the wife did desert her husband when she walked out on January 11, 1946, when her face was slapped. That was desertion. The slapping was brought about by her referring to this man Hill in a way which irritated her husand so that he smacked her face, and that was the circumstance which led to her leaving him and writing the note which I have read. Therefore, she was in desertion at the date of the presentation of the petition. Accordingly, following the decision of the Court of Appeal in *Beard* v. *Beard* (1) there was a revival there, as against her, of the condoned adultery. As I understand that decision, if she did remain away and remained in a state of desertion (as she did until the petition was presented), even though it was only for a few days, she did not cancel the revival of the adultery by making an offer, which she subsequently made, to come back to her husband and to give up the association with Hill, whatever that association was. Moreover, when she made the subsequent offer, she was associating with Hill in such a way and so openly as to make it really a futile offer to come back, and one which no self-respecting man could possibly have accepted. Her attitude towards her husband all along seems to have been: "It was your duty to take me from the arms of this man." She virtually said so in her evidence this morning, that she was offended at her husband because when he came home and found she was with the co-respondent he did not come and take her away and rescue her from the arms of this paramour who had got hold of her while she had not got her husband's protection. I think that those offers of the wife's could, in any event, be disregarded.

It has been argued in this case—and I confess I was surprised to hear the argument—that even if the adultery of the wife was revived against her by her subsequent desertion it could not be revived against the co-respondent That seems to me to be a very odd proposition. Because the co-respondent has nothing to do with the condonation and nothing to do with the revival, either in this case or, indeed, in most cases, it seems odd that he should get the benefit of the condonation and not lose that benefit when the wife loses it by her own conduct in reviving the adultery. The position, as Mr. Swanwick put it, I think, is simply this. I have to consider on the case as a whole whether condonation exists as a bar. If there has been revival it does not exist as a bar, and that is good for the co-respondent

(1) [1946] P. 8.

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as well as good for the wife—and indeed, I think there is no authority to the contrary. Language has been used in many cases, and in particular in the Court of Appeal in *Bernstein* v. *Bernstein* (1), inveighing against the proposition that when you have condoned an act of adultery you should afterwards be entitled to rake it up. But that language, certainly in the decision of the Court of Appeal in *Bernstein* v. *Bernstein* (2) was not directed to the question of revival at all, and when the courts have had to consider the question of revival they have always held, as I understand it, that it is part of the law of England. Passages in judgments inveighing against the proposition that the past could be raked up do not assist very much when one bears in mind that the doctrine of revival, which involves raking up the past is part of the law of England. No question of revival arose in *Bernstein* v. *Bernstein* (1), and to my mind nothing in that case is of any assistance, except the earlier reference to an earlier case of *Norris* v. *Norris, Lawson and Mason* (3). The actual wording of the judgment of the Judge Ordinary does, of course, assist the argument of the co-respondent in this case. But the Judge Ordinary was only exercising his discretion on a question of costs, where there were two co-respondents, the adultery of one having been condoned and the petitioner being unable to prove his case against the second. He was in this position, that he could not get an order for costs at all, and in the exercise of his discretion the Judge Ordinary refused to condemn the first co-respondent in costs where that adultery had been condoned. In refusing to exercise that discretion he used language which went further than any that he need have used in saying : " I cannot condemn " Lawson in costs "—because if he had considered the doctrine of revival, which he obviously did not consider, he might not have used the word " cannot." But it is a very short report, and almost all that the learned judge said after that was : " The " petitioner, by condoning his wife's adultery with Lawson, " has waived all right to any proceedings against him in this " court." Again, if he had been considering the doctrine of revival he would not have said that. It is perfectly plain from that passage, and indeed from the passage in *Bernstein* v. *Bernstein* (1), to which I have made some slight reference, that the question of revival was not being considered at all.

I see no reason to doubt that in any event if the condonation

(1) [1893] P. 292.
(2) Ibid. 318.
(3) 4 Sw. and Tr. 237.

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goes it goes for all purposes, and I am quite certain that it is not open to a co-respondent to say: "Because the wife has been "forgiven you can never bring up the past against me although "you may bring it up against her." That seems to be an impossible proposition. Therefore, in any event I should find that the petitioner is entitled to succeed. The petitioner is entitled to his decree, to an order for costs against the co-respondent and to an order for damages. This is not a case in which it would be any use probably to make a very large order for damages. The respondent has shown herself to be a woman of some frailty, and there are no children. The married life lasted effectively only from 1936 to 1943. I have come to the conclusion that the damages should be assessed at 200*l.*

Decree nisi granted with damages.

Solicitors for the petitioner: *Taylor, Jelf & Co.*
Solicitor for the co-respondent: *W. R. Perkins.*

J. B. G.

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1947
Feb. 26.

Lord Merriman P.

Divorce—Desertion—Intention to desert—"Feeble-minded person"—Mental Deficiency Act, 1913 (3 & 4 *Geo.* 5, *c.* 28)—*Mental Deficiency Act*, 1927 (17 & 18 *Geo.* 5, *c.* 33).

A wife deserted her husband in March, 1938, and since October, 1938, had been treated as a feeble-minded person as defined by s. 1 of the Mental Deficiency Act, 1927. In November, 1940, she was released on licence to her mother and had resided with her thereafter:—

Held, that she was not rendered incapable by that degree of mental defectiveness of continuing the intention to desert her husband.

Williams v. *Williams* [1939] P. 365, distinguished and held inapplicable.

HUSBAND'S PETITION for divorce on the ground of desertion. The respondent appeared by her guardian ad litem.

The parties were married in 1930. In March, 1938, the

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respondent, who had previously left the petitioner on other occasions, left him for the last time. In 1937, the respondent had been arrested on a charge of larceny at Scarborough, but the matter had been referred to the probation officer and the petitioner had taken his wife back; in October, 1938, the respondent was convicted of larceny by a court of summary jurisdiction at Leeds, which postponed passing sentence, being satisfied that the defendant was a defective within the meaning of the Mental Deficiency Acts, 1913 to 1927 (1), and directed that a petition be presented to a judicial authority under the said Acts, with a view to obtaining an order that the defendant be sent to an institution or placed under guardianship. In November, an order was made and she was sent to a Public Assistance Institution at West Hartlepool as a "feeble-"minded person." Continuation orders were made by the Board of Control, and from February, 1940, to the date of the petition, the respondent had been released on licence to her mother.

(1) Mental Deficiency Act, 1927 (17 & 18 Geo. 5, c. 33), s. 1: "(1) The following section shall be "substituted for section one of "the Mental Deficiency Act, 1913 "(in this Act referred to as 'the "'principal Act')—

"1.—(1) The following classes "of persons who are mentally "defective shall be deemed to be "defectives within the meaning of "this Act:—

"(*a*) Idiots, that is to say, per-"sons in whose case there exists "mental defectiveness of such a "degree that they are unable to "guard themselves against com-"mon physical dangers:

"(*b*) Imbeciles, that is to say, "persons in whose case there "exists mental defectiveness "which, though not amounting to "idiocy, is yet so pronounced that "they are incapable of managing "themselves or their affairs or, in "the case of children, of being "taught to do so;

"(*c*) Feeble-minded persons, "that is to say, persons in whose "case there exists mental "defectiveness which, though not "amounting to imbecility, is yet "so pronounced that they require "care, supervision and control "for their own protection or for "the protection of others or, in "the case of children, that they "appear to be permanently in-"capable by reason of such "defectiveness of receiving proper "benefit from the instruction in "ordinary schools;

"(*d*) Moral defectives, that is to "say, persons in whose case there "exists mental defectiveness "coupled with strongly vicious or "criminal propensities and who "require care, supervision and "control for the protection of "others.

"(2) For the purposes of this "section, 'mental defectiveness' "means a condition of arrested "or incomplete development of "mind existing before the age of "eighteen years, whether arising "from inherent causes or induced "by disease or injury."

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John B. Gardner for the petitioner.
Stuart Horner for the respondent.

1947. Feb. 26. LORD MERRIMAN P. reviewed the history of the marriage up to 1938, referring to the occasions on which the respondent had left the petitioner and to the trouble occasioned to him by the respondent's pilfering and said: There is, in my opinion, quite sufficient evidence on which I can hold that the wife deserted the husband on or about March 18, 1938. That, however, is not the whole question and it is here that the only point of difficulty arises, because it is a case under the Mental Deficiency Act, only turned the other way round. Mr. Horner on behalf of the wife, appearing through the Official Solicitor, said that I ought not to find that the desertion continued throughout the whole period preceding the presentation of the petition although in the ordinary course desertion is presumed to continue unless the contrary is shown, the reason for this submission being that the wife became subject to the Mental Deficiency Acts, 1913–1927. The wife was brought up before the Leeds justices, and on October 24, 1938, was convicted of larceny; but the Court, being satisfied on medical evidence that she was a defective within the meaning of the Mental Deficiency Act, postponed passing sentence and directed that a petition be presented to the proper authority. That was an interim order. Finally, on November 22, 1938, she was committed to an institution at Gateshead on the ground that she was a feeble-minded person. She was eventually transferred from the colony for mental defectives at West Hartlepool to Meanwood Park Colony in Leeds about November 4, 1940. Since she got there she was released on leave of absence under licence to her mother who was living at Leeds, and there she has been as far as I know ever since. She has not, therefore, been under restraint at all.

At no time since she left home in March, 1938, has the wife ever made the slightest sign of any overtures to bring this state of desertion to an end. Equally no doubt the husband has not done so, but I have already found that the wife was in fact the deserter. It is said that by reason of the fact that from October, 1938, she has been treated as a mental defective under the Mental Deficiency Act I must hold that she was incapable of continuing to have the intention to desert and, therefore, that I cannot find that she has been guilty of desertion from the time she came within that Act. It follows if that be correct

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that I cannot find her guilty of desertion for three years immediately preceding the presentation of the petition.

I am referred to *Williams* v. *Williams* (1), a case in which it was held that a person of unsound mind certified as such and in respect of whom a reception order has been made under the Lunacy Acts, is incapable from the date when he or she is of unsound mind of continuing to have a deserting mind. If this case were such as that I should have, whatever my own opinion might be, no option but to give full effect to that decision. But it seems to me that this case is a very long way removed from that for these reasons : The Lunacy Act, 1890, deals with what were then called " lunatics." By the definition section in the Lunacy Act, a " lunatic " means " an idiot or person of " unsound mind." By the Mental Treatment Act, 1930 the word " lunatic " is no longer to be used and wherever it would have been appropriate to use the word " lunatic " Parliament has enjoined that the words " person or patient of unsound mind " shall be used. The words " of unsound mind " now cover the old category of " lunatics." That is because (apart altogether from the desire to get rid of any hurtful nomenclature which was one of the principal objects of the Act of 1930) the category of " idiot " has been removed from the Lunacy Act, 1890, and put into the Mental Deficiency Act, 1913.

One of the classes of persons now under the Act of 1927 is an idiot. There are four classes of people comprised within the definition whether one looks at the Act of 1913 or the Act of 1927. The only essential difference between the two sections is that whereas the Act of 1913 in connexion with idiots, imbeciles and the rest, had the element of persistence of the mental deficiency from birth or at any rate from early childhood, that element is eliminated in the definition in the Act of 1927. The definition is framed, so to speak, on a diminishing scale. You start with " idiots," you go on to " imbeciles " whose defectiveness is expressly stated not to amount to idiocy ; then you go down to " feeble-minded persons," whose mental defectiveness is stated not to amount to " imbecility."

The definition of a feeble-minded person is one " in whose " case there exists mental defectiveness which, though not " amounting to imbecility, is yet so pronounced that he " requires care, supervision and control for his own protection " or for the protection of others." Imbeciles are " persons in " whose case there exists mental defectiveness which, though

(1) [1939] P. 365.

" not amounting to idiocy, is yet so pronounced that they are " incapable of managing themselves or their affairs . . . . " A feeble-minded person is by statute assumed to be one who cannot be regarded as incapable of managing himself or his affairs. To put it quite shortly a feeble-minded person within the Mental Deficiency Act is three statutory removes away from a person of unsound mind. The removes are first of all that idiots have been taken out of the definition of a lunatics, or as they are now called, persons of unsound mind—they are outside the Lunacy Act altogether. The second remove is from idiots to imbeciles, and the third remove in this diminishing category of defectiveness is from imbeciles to feeble-minded persons. The whole basis of the judgment in the Court of Appeal in *Williams* v. *Williams* (1) is that persons of unsound mind are incapable of forming any intention at all. I can see no reason whatever for importing that judgment into a case like this where the person is not of unsound mind but is merely a mental defective, and in the third category of such persons.

It is also said that being still under the Mental Deficiency Act she is physically unable to return to her husband ; she is merely released from the Meanwood Colony under licence issued under reg. No. 100 passed by virtue of s. 41, sub-s. 1, of the Mental Deficiency Act, 1913. My attention has been called to sub-s. 4 of that regulation : " A patient who is absent on " licence shall reside with the person named for that purpose in " that licence, unless the persons granting and the persons (if " any) concurring in the grant of the licence otherwise permit." Be it so, there is nothing to prevent her walking about Leeds, nothing to prevent her going to see her husband and sounding him on the question whether he would be prepared to take her back, in which case it would remain to be seen what the authorities would be prepared to do. She has never made any attempt to do that although she has been physically at large ever since November, 1940, and living in the same town. So far as the mere physical inability to resume cohabitation is concerned, that matter has already been dealt with in *Drew* v. *Drew* (2), an authority the validity of which is specifically recognized in *Williams* v. *Williams* (1). It comes back to the point that *Williams* v. *Williams* (1) decided that a person who is of unsound mind in the full sense of the word cannot be said to be capable

(1) [1939] P. 365. (2) (1888) 13 P. D. 97.

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of desertion. I cannot bring myself to hold that a person who by statute is three degrees lower in the scale of mental illness is incapable of continuing the intention to desert which she plainly manifested in March, 1938. That being so, there is no reason why I should not pronounce a decree of divorce on the ground of desertion.

Solicitors: *Dale H. Parkinson, The Law Society, Services Divorce Department; The Official Solicitor.*

J. B. G.

Followed. ROSS *v.* ROSS. [1950] 1 All E.R. 654.

Followed. Ross *v.* Ross [1950] P. 160

KILFORD *v.* KILFORD.

1947

June 23; July 22.

Barnard J.

Divorce—Maintenance—Application by successful wife petitioner to High Court—Existence of maintenance order of court of summary jurisdiction—Undesirability of concurrent orders—Election of remedy—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 190—Administration of Justice (Miscellaneous Provisions) Act, 1938 (1 & 2 Geo. 6, c. 63), s. 14.

It being undesirable that there should be two orders for maintenance in favour of the same person in existence at the same time, a successful wife petitioner, who has previously obtained a maintenance order from justices, must elect either to retain that order or to obtain an order in the Divorce Court.

SUMMONS ADJOURNED into court.

This was a wife's application for maintenance after a decree absolute had been pronounced in her favour, she having previously obtained in a court of summary jurisdiction an effective order for maintenance against her husband.

Patrick O'Connor for the petitioner.

J. F. Coplestone-Boughey for the respondent.

Cur. adv. vult.

July 22. BARNARD J. This is an application by a wife petitioner for maintenance under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, she having obtained a final decree of divorce against the respondent husband on January 13, 1947. On January 12, 1944, the petitioner obtained a maintenance order for 2*l.* per week against the respondent in the

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court of summary jurisdiction at Colchester, and that order remains an effective order, notwithstanding the divorce, until it is varied or discharged by that court. The respondent is now employed at a salary of approximately 420*l.* per annum, and the petitioner is a state registered nurse employed at a salary of about 160*l.* per annum, together with free board and lodging. At the present time both parties are content that the payments under the order of the court of summary jurisdiction should continue, but the petitioner, in addition thereto, asks for an order of this court for payment by the respondent to herself of a nominal amount by way of maintenance under s. 190, sub-s. 2, of the Supreme Court of Judicature (Consolidation) Act, 1925, in order to preserve her right to apply for an increase, in futuro, under the Administration of Justice Act, 1938, s. 14.

This present application for maintenance originally came before the registrar on May 5, 1947, and he directed that it should stand adjourned sine die, to be restored for hearing if and when the order of the court of summary jurisdiction was discharged; the petitioner appealed from this decision and the appeal came before me on May 15, 1947. I thought it right to call for a report from the registrar and to adjourn the appeal into open court for argument. The matter was further argued before me in open court on June 23, 1947, when I had the registrar's report, dated May 16, 1947, before me.

I have come to the conclusion that the registrar was wrong in adjourning the petitioner's application for maintenance sine die. By s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, the court is given power to award maintenance on any decree for divorce, and Lord Sterndale M.R., said, in the course of his judgment in *Scott* v. *Scott* (1): "... that the word 'on' does not mean an "unlimited time within the judge's discretion, but it does "mean within a reasonable time having regard to all the "circumstances of the case." Again, in *Mills* v. *Mills* (2), Sir Wilfrid Greene M.R., in referring to the court's jurisdiction under s. 190, said: "That jurisdiction can only be exercised

(1) [1921] P. 107, 120.
(The relevant Act at that date was the Matrimonial Causes Act, 1907 (7 Ed. 7, *c.* 12), which was repealed by the Act of 1925. Section 190 of the Act of 1925 replaced s. 1 of the Act of 1907, both sections beginning: "The court "may if it thinks fit, on any "decree ...")

(2) [1940] P. 124, 129.

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" on any decree for divorce or nullity of marriage. Accordingly, " if an application is made by a wife of which it can fairly be " said that an order made upon it would not be made ' on ' " such a decree, the court has no power to accede to the " application." The registrar's order seems to me to offend both the letter and the spirit of the statute, and must, therefore, be set aside.

The only question, therefore, left for me to decide is whether or not the petitioner is entitled to a maintenance order from this court, even though it be for a nominal amount, in addition to the order made in her favour by the justices. I consider that it would be most undesirable that there should be two orders for maintenance in existence at the same time. In *Rex* v. *Middlesex Justices. Ex parte Bond* (1), Avory J. says: " The inconvenience of holding that there is con- " current jurisdiction in the Divorce Court and in the justices is " obvious, for if the justices may make an order as in this case, " there is nothing to prevent the husband going to the Divorce " Court the next day and asking, possibly successfully, for a " contrary order. The question might see-saw between the " two courts, producing an absolute scandal."

Avory J. was referring to an order for custody made by justices, but this passage was referred to with approval by both Lord Merriman P. and Langton J. in *Higgs* v. *Higgs* (2), in which case an order for maintenance made by a metropolitan police magistrate was in issue.

It might be suggested, because the wife is only asking for what is called a nominal order in order to preserve her rights, that this could neither conflict with the order made by the justices nor embarrass the respondent; but none the less a so-called nominal order is an order for maintenance made under s. 190, sub-s. 2, of the Supreme Court of Judicature (Consolidation) Act, 1925, and on principle I think that a successful wife petitioner, who has previously obtained a maintenance order from justices, must elect either to retain that order or obtain an order in the Divorce Court. I am fortified in this view of the matter by what Lord Merriman P. said in the course of his judgment in *Kirk* v. *Kirk* (3): " Assuming that the " justices had jurisdiction, in their discretion, to keep the order " alive, manifestly one of the matters which would guide them

(1) [1933] 1 K. B. 72, 80.
(2) [1935] P. 28.
(3) [1947] W. N. 161; 63 T. L. R. 422.

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" and this court in considering the exercise of that discretion " notwithstanding the decree of divorce would be whether the " wife had any alternative rights in Scotland where she had " obtained her decree . . . . " In that sentence the use of the word " alternative " is to be noted. If in the present case the petitioner desires an order for maintenance from this court, I am prepared to adjourn her application to enable her to apply under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, to the justices at Colchester to have their order discharged. If, on the other hand, she prefers to rely on that order, then her present application for maintenance to this court must be dismissed.

Solicitors: *Corbin, Greener & Cook, Agents for Thompson, Smith & Puxon, Colchester; C. Hampton Vick, Agent for S. J. Peters, Cambridge.*

Wood v. *Wood* - - - [1947] P. 103
Distinguished. BEER *v.* BEER
(NEILSON CITED) - [1948] P. 10

I. B. G.

Considered. HADLUM *v.* HADLUM. [1948] 2 All E.R. 412.

WOOD *v.* WOOD.

Considered. HADLUM v. HADLUM. [1949] P. 197

1947
April 16.

Lord Merriman P. and Jones J.

Justices—Alleged adultery—346 day period of gestation—Notional and actual calculations—Insufficient grounds for desertion.

In cases where the length of gestation of a child born to a party is relevant it is necessary to attempt, but difficult to achieve, some reconciliation between the notional reckoning of the normal period of gestation and a period in which the earliest or latest date from which conception could possibly date was fixed and known. It is fallacious to attempt to mix the notional and the actual in the period of calculation. In the total absence of evidence of any improper association between the wife and any man, the court is not judicially bound to hold that a wife has committed adultery because a period of 346 days has elapsed between the last act of coitus and the birth of the child: nor is it a circumstance which can be relied on by the husband as creating in his mind a reasonable belief that she has been guilty of a matrimonial offence, so as to provide him with a defence to proceedings based on desertion.

Glenister v. *Glenister* [1945] P. 30 distinguished.

APPEAL by the husband from a decision of the justices for the petty sessional division of Prescot in the County of Lancaster, by whom he had been found guilty of desertion and of wilful neglect to maintain his wife and her infant child. The justices, in their reasons for coming to their decision, stated that they had been asked to infer adultery from the

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apparently lengthy period of gestation, and that the wife had denied adultery on oath, her conduct not having been called in question. They considered that an allegation of adultery was a serious allegation which must be strictly proved and that they could not on the evidence assume the wife's adultery. They referred to *Gaskill* v. *Gaskill* (1) and to Lord Birkenhead's judgment therein.

The last possible date of coitus was found to be August 10, 1945, and the child was born on July 20, 1946.

The husband appealed.

H. B. Grant for the husband.

The wife did not appear.

LORD MERRIMAN P. : This is an appeal by a husband from the decision of the justices for the Prescot petty sessional division of Lancashire, who had made an order finding desertion proved as from a date which was given as August 25, 1946, the date on which the husband wrote a letter indicating very plainly his intention to abandon his wife, and making an order for the maximum amount in respect of the wife and the child. So far as the amount is concerned no question arises. The whole point of the appeal is that it is complained that the justices rejected the husband's defence that he was not bound to continue cohabitation with his wife because she had committed adultery. The case raises rather a curious point. The parties were married in March, 1945, and were only able to live together so far as was permitted by the fact that she was serving in the Land Army and he was a chemist, and there is evidence sufficient to show, if the justices chose to accept it (as I am assuming that they did) that the last date on which the husband and wife actually cohabited was on or about August 8, 1945. A child was born on July 20, 1946, which appeared to be at least fully-grown, and, if anything, rather over the average weight. There is not a shred of evidence adduced by the husband about any sort of association between the wife and any other man named or unnamed, but the husband has based this charge of adultery solely on the length of the period of gestation, on the assumption that the conception was the result of their last cohabitation and the fact that the last relevant date of their living together was in August, 1945. Counting from the latest possible date, on

(1) [1921] P. 425.

the assumption which the husband was putting forward, which, I believe, was actually August 10, 1945, the actual period of gestation was 346 days, and it is said that that is proof positive that this child was not his, and therefore, that the wife has committed adultery. The magistrates having heard the evidence (a midwife was called, but no medical evidence), state in the reasons for their decision that they were asked to infer adultery from the apparent length of the period of gestation, that the wife had denied on oath the alleged adultery, and that her conduct was not called in question, but that the period extended in this case far beyond the normal length of gestation, which, according to the usually accepted average, and the evidence of the midwife, is 280 days. They go on to say: "We considered that an allegation of adultery "was a serious allegation which must be strictly proved, "and that we could not on that evidence alone assume the "wife's adultery and that it was impossible that the defendant "could be the father of the child. In these circumstances we "accepted the evidence of the wife, and found that she had "not committed adultery." And they refer to Lord Birkenhead's judgment in *Gaskill* v. *Gaskill* (1).

In *Gaskill* v. *Gaskill* (1) Lord Birkenhead (who was sitting as a judge in the Probate, Divorce and Admiralty Division) was dealing with facts whereby it was fixed that the last possible date for sexual intercourse before the birth of the child was 331 days. In the converse case of *Clark* v. *Clark* (2), I was dealing with a case in which the earliest possible date on which sexual intercourse could have occurred before the birth of a prematurely born child was 174 days. In both cases Lord Birkenhead and I were pointing out the necessity of attempting, but the difficulty of achieving, some reconciliation between the notional reckoning of the normal period of gestation and a period in which the earliest or latest date, as the case might be in the one case or the other, from which conception could possibly date was fixed and known. This at least is clear, that it is fallacious to attempt to mix the notional and the actual in the period of calculation.

I am not going to say any more about this particular case than this: we have been asked to say that there comes a point at which any judge must take judicial knowledge of the fact that the period is outside nature altogether. I agree. Of course there must come such a point, and the whole question

(1) [1921] P. 425. (2) [1939] P. 228.

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is whether, in a case in which we have had no advantage of medical information, no advantage of an argument on the other side (though Mr. Grant has been most careful to put everything before us in the clearest possible way) we are bound to say that that stage has come at a point fifteen days longer than the period with which Lord Birkenhead dealt in 1921 in similar circumstances, in a case in which, as here, and as in the converse case of *Clark* v. *Clark* (1), there was not a shred of evidence of any adulterous or improper association between the wife and any man. One can, of course, add grains of corn together, and there must come a time when they become a heap. You can say that it is impossible to know where to draw the line ; yet you can say that one case or another must plainly be on the wrong side of any line you can possibly draw. With all that I agree. But I absolutely decline, on the information before us in this case, to say that we are judicially bound to hold that this period of 346 days, fifteen days longer than the period with which Lord Birkenhead was dealing in 1921, is on the wrong side of any line which can possibly be drawn, that we are judicially bound to hold that this wife has committed adultery, and that the magistrates were wrong in rejecting that contention.

There remains only the alternative point, on which it is said that even if the wife did not commit adultery and the primary case is rejected, nevertheless the circumstances were such that the husband had every right to believe that she had committed adultery, and, therefore, on the authority of *Glenister* v. *Glenister* (2), the husband cannot be held to be a deserter, because, as he said in his letter, he did not accept the paternity of this child. Now, there seem to me to be several objections to that. In the first place, it was not the case which was put before the magistrates, but has been raised here as an afterthought. The case before the justices was " My " wife has committed adultery," and the husband stood or fell by that. The *Glenister* type of case was not put forward at all, and although I do not say that it is a fatal objection, it is one which requires a good deal of consideration when the party in whose favour the order was made is not present on the appeal. But I think there is a much stronger objection than that. *Glenister* v. *Glenister* (2) was a case which turned on the finding that the wife had so misconducted herself as to lead any reasonable husband to suppose that she had

(1) [1939] P. 228. (2) [1945] P. 30.

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committed adultery. I am not going into the facts of *Glenister* v. *Glenister* (1) again. Suffice it to say that one of the suspicious circumstances was that she had been caught at night by her husband with men in her room—the suggestion was that she was living the life of a prostitute—and the men had succeeded in escaping in highly suspicious circumstances—and in addition to that there was the birth of a child. It is true the inference to be drawn from the proof of that was made somewhat difficult by the well-known rule in *Russell* v. *Russell* (2); and there were other circumstances, in connexion with venereal disease; but it is quite unnecessary to point to the differences between the two cases. The point is this, if I may read one passage from my judgment (3): "Take a hypothetical case, in which, "short of actual and direct proof of adultery, the wife so "conducts herself to the knowledge of the husband as to "warrant the inference that adultery has been committed, "though (I am supposing) that is ultimately held not to be "the fact." I then call attention to the dilemma in which a husband might be placed, the simplest illustration of which would be a circumstantial confession of adultery by the wife herself, which proved afterwards to be a lie, for some purpose of her own, the dilemma being that either the husband remains with the wife, in which case he condones, or he goes away and leaves her because of the confession, or whatever the other conduct might be, in which case he is held to be a deserter; and I ended this passage by saying: "It seems to "me to put the husband in an almost impossible position, if "that is the law. But the question is whether it is the law. "I do not think it is. I think that if the wife has so conducted "herself as to lead any reasonable person to believe, until "she gives some explanation, that she has committed adultery, "the husband, becoming aware of the facts, and honestly "drawing that inference, and leaving his wife on that ground, "ought not to be held to have left her without reasonable "cause." The whole point is that it is the wife's misconduct which induces the reasonable belief on the part of the husband.

That brings me back again to *Gaskill* v. *Gaskill* (4), where, at the conclusion of his judgment, Lord Birkenhead called attention to the fact, in expressing the hope that there might be a reconciliation, that the young couple in that case had both been "the sport of nature," words which seem to me to be

(1) [1945] P. 30.
(2) [1924] A. C. 687.
(3) [1945] P. 30, 38.
(4) [1921] P. 425, 434.

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applicable exactly to this case. It seems to me to be quite impossible to apply the principle and the reasoning on which *Glenister* v. *Glenister* (1) is based to a case where the wife has done nothing wrong herself, but has been the victim of a freak of nature.

That being so, this appeal fails, and must be dismissed.

JONES J.: I agree, and have nothing to add.

Solicitor: *G. Houghton and Sons.*

(1) [1945] P. 30.

J. B. G.

Morris v. *Morris and Morris and Manning* [1947] P. 108.
Considered. Goss *v.* Goss [1948] P. 15

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July 17, 24.

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Divorce—Evidence—Denial of condonation where such denial would bastardize a child—Inadmissibility if tendered by spouse.

Evidence by a husband denying intercourse, even though it be directed solely to the issue of condonation, is inadmissible if the effect of such evidence would be to bastardize a child born within the time of wedlock.

The observations of the Divisional Court in *Glenister* v. *Glenister* [1945] P. 30, at pp. 32 and 42, favourable to the admissibility of such evidence when directed to an issue of condonation were in no wise necessary for the decision of the true issues in that particular case, and must be treated as obiter.

Consideration must, however, be given to the possible length of gestation in deciding whether or not such evidence would bastardize the child.

Russell v. *Russell* [1924] A. C. 687 applied.

INTERVENTION by the King's Proctor to show cause why a decree nisi pronounced in favour of the petitioner should not be made absolute.

On October 31, 1946, the petitioner was granted a decree nisi on the ground that his wife had committed adultery with two named co-respondents. The suit was undefended, and the adultery—alleged to have taken place between 1943 and 1945—was proved by confessions, the respondent signing hers in the presence of the petitioner on June 15, 1946. It was alleged by the King's Proctor that the petitioner had continued to live with his wife until the end of June, and that he had continued

to visit her and have marital intercourse until August Bank Holiday, 1946. The petitioner admitted normal relations with his wife until the night of June 14, 1946, when, he said, his wife first told him of her adultery.

On April 3, 1947, namely two hundred and ninety-three days after June 14, 1946, the respondent gave birth to a child—a full-time, normal baby—who was alive when the case was heard. The preliminary question, therefore, arose whether it was competent for the petitioner, in order to rebut the allegation of condonation, to give evidence denying that he had had marital intercourse with his wife after learning of her adultery.

J. Syms for the King's Proctor; *J. H. Moss* and *J. A. Petrie* for the petitioner.

Cur. adv. vult.

July 24. WILLMER J. This case arises out of an intervention by the King's Proctor to show cause why a decree nisi pronounced in favour of the petitioner on October 31, 1946, should not be made absolute. The petition was by a husband, and was based on the alleged adultery of his wife with two named co-respondents. The case, which was undefended, came before Mr. Commissioner Wethered, when the adultery was proved by confessions voluntarily made by the respondent and both co-respondents. It is now alleged by the King's Proctor that the petitioner presented a false case, in that he omitted to inform the court that he had condoned the alleged adultery by living with the respondent, and having intercourse with her, with full knowledge of the facts after learning of the alleged adultery.

The adultery complained of took place while the petitioner was away from home on military service during 1943 and 1944, and again in 1945 after the petitioner's discharge, during a period of some four months when he was living away from home. It is common ground that from then onwards the petitioner lived with the respondent until some time in June, 1946. It is also common ground that on June 15, 1946, the petitioner and respondent attended together at the office of the petitioner's solicitors, when the respondent voluntarily made and signed a full confession of her adultery. From that time onwards, therefore, on everybody's case, the petitioner had full knowledge of the respondent's adultery. The case

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for the King's Proctor is that some time previously, early in the month of June, the respondent had confessed her adultery privately to the petitioner. Notwithstanding this it is alleged that the petitioner continued to live with the respondent at the home of the respondent's mother, share the same bed with her, and have sexual intercourse with her, until about June 29, when it is said that he went away to live with his own parents. It is further alleged that even after that date the petitioner continued to visit the respondent, and to spend odd nights with her, enjoying sexual intercourse, about twice a week, until the night of August Bank Holiday, 1946. During the material period—i.e., from early June to early August, 1946—there is no evidence to show that the respondent committed adultery with any man.

The case is complicated by the fact that on April 3, 1947—i.e., some five months after the decree nisi was pronounced, and some considerable time after the King's Proctor's intervention—the respondent gave birth to a child, who is, of course, prima facie a child of the marriage. The evidence of the midwife who was present at the birth is that the child was a full time, normal baby. The child is alive to-day.

In these circumstances the question immediately arises whether, having regard to the rule in *Russell* v. *Russell* (1), it is competent for the petitioner, in order to rebut the allegation that he condoned his wife's previous adultery, to give evidence denying that he had intercourse with her after learning of the adultery. This point was quite properly brought to my attention by counsel on behalf of the King's Proctor, who, at the same time, disclaimed any desire to succeed upon a mere technical rule of evidence or to prevent the petitioner from having the fullest and freest opportunity of presenting by his own evidence his own version of the facts. Since the parties were present in court, and had travelled a considerable distance to London for the hearing of the case, I deemed it expedient, rather than keep them waiting about while the technical question of the admissibility of the evidence was determined, to take the evidence, not only of the other witnesses but also of the petitioner and the respondent de bene esse. But the question having been raised, I must still determine how much, if any, of the petitioner's evidence was admissible.

In *Glenister* v. *Glenister* (2), Lord Merriman P. is reported to have said (3) that evidence by a husband denying inter-

(1) [1924] A. C. 687.
(2) [1945] P. 30.
(3) Ibid. 32.

course was clearly admissible for the purpose of rebutting any question of condonation, notwithstanding the subsequent birth of a child. A similar view was expressed by Pilcher J. in the same case (1). These expressions of view, if they are binding upon me, are, of course, decisive of the point raised in this case. But it is, I think, to be noted that the actual question which arose for decision in *Glenister* v. *Glenister* (1) was whether a reasonable, though mistaken, belief by a husband that his wife had been guilty of adultery was sufficient cause to justify the husband in leaving the wife, so as to afford a good defence to a charge of desertion. The observations made by Lord Merriman P. and Pilcher J. were in no wise necessary for the decision of that question, and, I think, therefore, that I must clearly treat them as obiter. While fully conscious of the respect which is due to such expressions of opinion by two such experienced judges, I conceive it to be my duty, now that the point has arisen directly for decision in the present case, to examine the grounds on which their opinion was based and to form my own conclusions on the point.

Lord Merriman P. cites as his authority (for saying that evidence by a husband denying intercourse with his wife must be admissible on the question of condonation) a passage in the speech of Lord Dunedin in *Russell* v. *Russell*, in which Lord Dunedin said (2) : " But then it is said that the testimony of the " spouses has been admitted in many other cases—in nullity, " condonation, cruelty, and, lastly, in adultery, in the Divorce " Court of recent years. Now as regards nullity, cruelty and " condonation I do not feel the slightest difficulty ; the whole " point of Lord Mansfield's dictum rests on the concluding " words : ' and to make the issue spurious,' in other words, " it is when conjugal conduct is used, not as a thing in itself, " but as leading to other inferences that the harm comes in. " No proof of conduct or want of conduct which shows nullity, " no proof of cruelty, such as communicating venereal disease, " no proof of connexion such as in itself is condonation, has the " remotest reference to the point of legitimacy of issue. The " evidence of the spouses in these cases is the only evidence " available to the direct fact in issue, and has in the giving of " it no evil consequences."

This passage has been interpreted to mean that whenever it may be necessary for the purpose of rebutting any suggestion of condonation a husband is at liberty to give evidence denying

(1) [1945] P. 30, 42. (2) [1924] A. C. 687 ; 728, 729.

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intercourse, notwithstanding that the effect of such evidence may be to bastardize a child subsequently born. If this is what Lord Dunedin meant, his view is quite clearly opposed to that of Lord Finlay, who in terms expressed the contrary opinion (1). It is also, in my judgment, equally clearly opposed to the view of Lord Birkenhead, who expressed his conclusion in the following words (2): "... the rule as "laid down by Lord Mansfield, and other great judges, is a "general rule to be applied, in the full generality of its scope, "to all cases which it is wide enough to cover."

The rule as laid down by Lord Mansfield was laid down in the year 1777 in *Goodright's* case (3), in two passages which are quoted by Lord Birkenhead in *Russell* v. *Russell* (4). The first of these passages is as follows: "'The Law of England "'is clear, that the declarations of a father or mother cannot "'be admitted *to bastardize the issue born after marriage*'." In the second passage Lord Mansfield said: "'As to the time "'of the birth, the father and mother are the most proper "'witnesses to prove it. But it is a rule founded on decency, "'morality and policy that they shall not be permitted to say "'after marriage, that they had had no connexion, *and therefore* "'*that the offspring is spurious*'."

If the rule as so stated is to be applied, in the full generality of its scope, to all cases which it is wide enough to cover, how can an exception be made in cases where it is sought to adduce evidence of the kind in question for the purpose of rebutting a suggestion of condonation? With the greatest respect to the views expressed by Lord Merriman P. and Pilcher J., I do not believe that the words used by Lord Dunedin, in the passage from his speech which I have quoted, bear the meaning which has been imputed to them. Earlier in his speech Lord Dunedin himself had expressed his general conclusion with regard to the case before him in the following terms (5): "I am therefore of opinion that the words of "Lord Mansfield are directly applicable to this case, and that "it is against the interests of decency and public policy that "the spouses should be allowed to give evidence of non-access, "and thus de facto, even if not de jure, to bastardize their "issue, when conception and birth alike fell within the time "of wedlock."

(1) [1924] A. C. 687, 719.
(2) Ibid. 704.
(3) (1777) 2 Cowp. 591, 592, 594.
(4) [1924] A. C. 687, both at 697.
(5) Ibid. 727, 728.

I think it is clear that when, in the later passage in his speech, he deals with the question of condonation, he did not have in mind the possibility that evidence by a spouse denying intercourse could possibly have the effect of bastardizing a child subsequently born in wedlock. Indeed, he says that no such evidence has the remotest reference to the point of legitimacy of issue. It seems to me that the clue to what was meant by Lord Dunedin in this passage of his speech is to be found in the argument for the respondent (1). What had been argued was that evidence of intercourse, or the absence of it, was commonly admitted in the Divorce Court without any suggestion that such evidence constituted a violation of the sanctity of married relations—and by way of illustration the cases of nullity, cruelty and condonation were instanced. With regard to condonation the case of *Rowell* v. *Rowell* (2) was cited —a case in which no question of the legitimacy of a child arose. This part of the argument was not directed to the question whether the admission of the evidence might tend to bastardize a child, but only to the question whether it violated the sanctity of married intercourse. Lord Finlay and Lord Dunedin, as I understand them, dealt with this argument by saying, in effect, that it had nothing to do with the question then before the House—Lord Finlay going on to say that in cases of condonation the evidence of non-access would, nevertheless, be inadmissible in the event, as he thought unlikely, of any question arising as to the paternity of a child. I feel sure that equally Lord Dunedin would have qualified his remarks in the same way if the possibility of the evidence tending to bastardize a child had been present to his mind. With all respect, I find myself unable to agree with the views expressed by the Divisional Court in *Glenister* v. *Glenister* (3), and my conclusion is that evidence by a husband denying intercourse, even though it be directed solely to the issue of condonation, is inadmissible if the effect of such evidence is to bastardize a child born within the time of wedlock.

This being so, the question arises whether the evidence of the husband in this case is such as would have the effect of bastardizing the child subsequently born. The husband's case is that there was no confession of adultery by his wife, or by either of the co-respondents, until the night of June 14, 1946. Until then the petitioner and the respondent lived together as

(1) [1924] A. C. 687, 695.
(2) [1900] 1 Q. B. 9.
(3) [1945] P. 30.

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man and wife, and normal relations continued between them. It is only after the night of June 14, 1946, that the petitioner seeks to deny further intercourse. Would such denial, if he is allowed to give it, have the effect of bastardizing the child? In my judgment quite clearly it would not. From June 14, 1946, to April 3, 1947, is two hundred and ninety-three days. The normal period of gestation is, of course, only two hundred and seventy-five days; but it is common knowledge that this period is frequently exceeded, sometimes by a considerable margin. Indeed, in *Gaskill* v. *Gaskill* (1) it was held in this court, by Lord Birkenhead, that, in the present state of medical knowledge, a period of three hundred and thirty-one days could not be said to be impossible, and it was accordingly decided in that case that evidence of non-access by a husband for that period was not sufficient to prove that the father of the child must have been someone other than the husband, so as to convict the wife of adultery. In the present case evidence that the petitioner ceased to have intercourse with the respondent after the night of June 14, 1946, would quite clearly be insufficient to prove that the respondent must have committed adultery after that date in order to bear the child. The evidence of the petitioner, therefore, could not, in my judgment, have the effect of bastardizing the child, and for that reason I hold that it is admissible.

The issue accordingly falls to be determined on all the evidence that has been given, including that of the spouses. [His Lordship reviewed the evidence in detail and concluded:]

In all the circumstances I find as a fact that on frequent occasions up to the beginning of August, 1946, the petitioner lived with, and had intercourse with, the respondent, thereby condoning her previous adultery, of which he had full knowledge at least since the middle of June. It follows that, in my judgment, the King's Proctor is entitled to succeed on his plea, and to have the decree nisi rescinded and the petition dismissed.

Decree nisi rescinded; Petition dismissed.

Solicitors: *The King's Proctor; Williamson, Hill & Co., Agents for Russell, Orme & Dykes, Ledbury.*

(1) [1921] P. 425.

J. B. G.

THE MIM.

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July 7, 8, 9, 10, 11, 31.
Hodson J.

Shipping—Prize—Neutral ship—Visit and search by British Naval Party—Ship ordered to British port for further examination—Ship's own master and crew responsible for navigation—Loss of ship and cargo during voyage—Claim for damages by owners—Whether original detention wrongful.

A Norwegian ship, while that country was still neutral, was stopped on the high seas off the North of Scotland by one of H.M. ships and a small armed party commanded by a visiting officer boarded her for the purpose of visit and search. Her cargo consisted of wheat ostensibly destined to a neutral port and the ship's papers appeared on inspection to be in order, but the visiting officer considered it desirable to direct her to proceed to Kirkwall for a more complete investigation, it being made clear to the master that the navigation of the ship was to remain under his control. The master reluctantly pursued the route indicated by the visiting officer. While proceeding to Kirkwall the ship stranded and became a total loss through a negligent error of judgment on the part of the master or his officers :—

Held, (1.) that the stopping of the ship for visit and search was not wrongful and the subsequent direction to proceed to a British port for further examination was, in the circumstances, justified by reasonable suspicion. (2.) That, on the evidence before the court, the master knew that he was left in control of the navigation to Kirkwall a port unfamiliar to him ; and (3.) that, nevertheless, His Majesty's Government was not liable for the loss of the ship and cargo through some error or negligence on the part of the ship's own personnel and the claim for damages failed.

PETITION OF RIGHT.

The owners of the Norwegian motor vessel, *Mim*, claimed damages from His Majesty's Procurator General, from the officer in command of *H.M.S. Colombo*, and from the officer in command of an armed party put on board the *Mim* on October 31, 1939, for the loss of the *Mim* laden with a full cargo of wheat which loss, the owners alleged, was caused by the negligent navigation of the *Mim* by the naval party on board, or, alternatively, by reason of the capture and seizure and the wrongful orders given to the master of the *Mim* to proceed to Kirkwall for examination after visit and search.

On September 9, 1939, the *Mim* left Fremantle, Western Australia, bound for Falmouth under a charter party, dated August 11, 1939, with a wide range of ports of discharge, including Hamburg, but which did not include any Norwegian port among the several alternative destinations. The ship

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called at Las Palmas for bunkers on October 14, and left for Vaksdal under orders to proceed round the North of Scotland. From the Norwegian vice-consul at Las Palmas the master received a certificate stating that the original charter was cancelled, and that the cargo had been bought by a Norwegian grain monopoly and was, thereupon, destined for Norwegian ports. On October 31, the *Mim* was stopped in a position to the north and west of the Faroe Islands by *H.M.S. Colombo* and boarded by a visiting officer and a guard of six naval ratings who, after inspection of the ship's papers directed the ship to proceed to Kirkwall for further examination. It was made clear to the master by the visiting officer that the master and his crew were to be responsible for the safe navigation of the ship to Kirkwall, the naval officer merely indicating the route required to be taken and seeing that the route was followed out. On November 1, the ship grounded on Reefdyke, North Ronaldshay, and became a total loss. The plaintiffs contended that the naval party was responsible for the navigation of the *Mim*. Alternatively, they pleaded that, even if the ship were lost through the negligence of the ship's officers, they were entitled to recover since the ship's officers were, in the circumstances, the agents of the defendants who were wrongfully in possession of the *Mim* and so responsible for her loss.

C. T. Le Quesne K.C. and *W. Porges* for the claimants. The claimants are entitled to damages in respect of their loss. Here there was a right to visit but no right to search nor was there any right to direct the ship to Kirkwall. They took possession of the ship which they had no right to do, and while in their possession the ship was lost. When the owners ask for return of their ship the Crown was not able to return it. The question is: Was there a right of search or examination? I do not challenge the right of search but there was no right of examination.

[Hodson J. The position would be no different if the ship was lost through the wilful negligence of the master.]

The visiting officer found the ship's papers in order and had no suspicion that the character of the ship was anything but quite legal: see Hall's International Law, 8th ed., at p. 890.

[Hodson J. Is there no authority on the rule relating to "suspicion"?] Counsel referred to Oppenheim's International Law, 6th ed., vol. II., at p. 711, on stopping of vessels for the purpose of visitation.

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[Hodson J. There is no authority to support that.] There are three requisites to this question: (1.) visit and examination; (2.) search at sea; (3.) further search if grave suspicion remains. On this authority a visiting officer runs risk of doing a wrong between visit and search at sea: see the judgment of Lord Sterndale in *Regina d'Italia* (1).

[Hodson J. You cannot examine a cargo of wheat at sea; to bring a ship into port for that purpose is really a part of the search.] Counsel referred to *The Bernisse* (2). Where papers are in order as they were here, unless the test is satisfied that the visiting officer did entertain a suspicion then the Crown ought to sustain the loss. Here there was not merely a visit for the purpose of search; an armed party was put on board and it amounted to a seizure. [Hodson J. The word "seizure" is improperly used here because it was merely the exercise of a belligerent right].

There was a seizure here in the sense that the party took control: see *Netherlands American Steam Navigation Co.* v. *H.M. Procurator General* (3). The Crown was acting not within the exercise of its belligerent rights. It was therefore unlawful and the ship has not been returned to the owners. The Crown was responsible for the safe navigation; the master was compelled to do what no competent seaman would have done, namely, to navigate down this very dangerous coast in war-time without lights, and at a time when no coast lights were being shown. I ask for judgment for the claimants.

Naisby K.C. and *J. V. Nesbitt* for the Crown. This was the proper exercise of the right of visit and search. The Crown had the right to send the ship into Kirkwall as a part of the right to search. The loss was not due to sending her into Kirkwall but was due to the negligence of the ship's officers who laid the course, took all necessary bearings and were responsible for a good look-out being kept. It is inconceivable that the small party put on board by the British navy could or would have taken charge. There was no engineer among them. In my submission the claimants cannot recover against the Crown. If the Crown did not contest the argument that this was a "seizure" it would be said hereafter that every visit was a seizure. Counsel referred to *The Maria* (4); *The Edna* (5). Detention is used in connexion with seizure as well as the more proper sense of visit and search. Reference was

(1) (1919) 9 Lloyd's P. C. 265; Hull's Digest, 112.
(2) [1920] P. 1, 5; [1921] 1 A. C. 458.
(3) [1926] 1 K. B. 84.
(4) (1799) 1 Ch. Rob. 340, 360.
(5) [1921] 1 A. C. 735, 751.

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made to *The Zamora* (1) ; *The Zaanland* (2) ; *The Noordam* (3) ; *The Louisiana* (4). It is said that the Crown took possession of the *Mim* ; it never did. If it had done so the ship must be returned to the owner or the Crown must prove that the ship's master had put her ashore. The claim ought to be dismissed.

Cur. adv. vult.

July 31. HODSON J. (after stating the facts and reviewing the evidence) said : The grounding and loss of the ship was thus due to the negligence of those in charge of the navigation ; namely, the master and officers of the *Mim*. There was no question of the navigation of the ship being taken out of their hands by the visiting naval officer, Lt. Maishman, nor was there any such interference with their navigation as would make him responsible for endangering the ship. It is argued on behalf of the plaintiffs that, even if the decisive part of the navigation remained in the hands of the *Mim's* officers, yet they did their best in circumstances of danger imposed on them by the route they were instructed to follow, which involved being compelled to navigate at night down the dangerous and unlighted coast of the Orkneys. Thus, it is said the responsibility for the loss of the ship is that of the defendants.

There is no substance in this contention in my opinion, and I am so advised by the Elder Brethren. Large numbers of mariners have navigated along this coast in similar circumstances, and there was nothing exceptionally dangerous in the route prescribed. The plaintiffs therefore fail in their claim in so far as it is based on the alleged negligence of the defendants in navigating the ship ; but the alternative argument of the plaintiffs is as follows : That even if the ship was lost through their negligence they are entitled to recover, since the ship's officers were in the circumstances the agents of the defendants, who were wrongfully in possession of the ship and so responsible for her loss. I am not aware of any English case where this argument has been successfully advanced, although the research of counsel discovered an American case of 1810, decided in the Supreme Court of Pennsylvania (see *Willcocks et al.* v. *Union Insurance Co.* (5)), where, in somewhat parallel circumstances, the navigating crew were held to be, as it were, the hands of the captors who had seized the vessel.

(1) [1916] 2 A. C. 77.
(2) [1918] P. 303.
(3) [1919] P. 57, 255.
(4) [1918] A. C. 461, 469.
(5) (1810) 2 Binn. 574.

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The first question is, however, whether the plaintiffs seized the ship at all by placing an armed guard on her in the course of visit and search. In arguing that there was a seizure, the plaintiffs rely on the decision of the Court of Appeal in *Netherlands American Steam Navigation Co.* v. *H.M. Procurator General* (1). In that case a neutral ship was stopped upon the high seas by one of H.M. Naval Patrol boats under the belligerent right of visit and search, an armed guard was put on board and she was ordered to proceed to a British port for better examination. No formal notice of seizure was given on arrival at the port; she was searched and, no contraband being found, she was released. It was held that those facts sufficiently amounted to a seizure or capture of the ship to give jurisdiction to the Prize Court to entertain a claim for compensation for her compulsory diversion and detention.

The jurisdiction of the Prize Court is defined in the commission where the court is authorized and required to take cognizance of and judicially to proceed upon all and all manner of captures, seizures, prizes and reprisals of all ships, vessels and goods that are, or shall be, taken and to hear and determine the same. The decision of the Court of Appeal was directed to that question and rejected the argument that a mere temporary detention in exercise of the right of visit and search was, for the purpose of the definition, inconsistent with capture. This use of the word "seizure" is no doubt in a sense wider than that normally used by international lawyers who speak of the centuries old right of belligerent warships to visit and search merchant ships, whether enemy or neutral, as a right existing before capture or seizure, the words capture and seizure being treated as synonymous. For example, in Oppenheim's International Law, vol. II., 6th ed., at p. 713, it is stated: "After a search at sea has brought nothing to light against the "vessel, seizure should take place only in case of grave "suspicion." Nothing, however, in my opinion, in this case turns on whether or not the word "seizure" is appropriate to describe the events which happened from the time the *Mim* was stopped and an armed guard put on board her. The question is whether the act of the Crown was wrongful or not. If it was not wrongful, the plaintiffs having failed to prove negligence, cannot, in my judgment, recover compensation.

The plaintiffs seek to draw a distinction between the right of visit and search and the right of examination. It is not

(1) [1926] 1 K. B. 84.

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disputed that, according to modern practice, it is recognized that examination cannot take place at sea and that ships can properly be taken into port for that purpose, but it is argued that visit and search are not co-extensive, that visit may be right but search may not. It is said that the ship's papers were in order and that in fact there was no suspicion, and that, therefore, from the moment when the boarding officer was satisfied, the ship ought to have been permitted to continue her voyage.

In *The Bernisse* (1), two neutral ships were stopped and although the officer who stopped them was satisfied that there was nothing connected with the papers or the cargoes of the ships which required further examination, and never considered that there was reasonable ground for detaining the vessels or sending them for examination except the absence of a so-called "green clearance," the *Bernisse* (2) was sent to Kirkwall and lost by enemy action. The Crown was held liable for the mistake which had been made. In giving the judgment of the Privy Council, Sir Arthur Channell said: "Counsel for the "respondents do further argue that even for a search reasonable "ground of suspicion must be shown, and that where everything "is in order on the papers, and there is no circumstance "suggesting hidden contraband, even a search on the spot "would be unjustifiable. In strictness this is, of course, correct "but so little suspicion is required to justify a search that their "Lordships are not prepared to say that if a boarding officer "were to state that finding a cargo to be in bulk he thought "something might be hidden under it, and therefore directed "a search, his conduct would be so unreasonable as to subject "the Crown to a liability for damages. That case must be "considered if it should arise. Here it does not appear to "arise." This statement of the law was given after argument in which a decision of Lord Sterndale in *The Regina d'Italia* (3), heard on February 6, 1919, was cited. It is referred to in Hull's Digest of Prize Cases, at p. 112, and I have been referred to a print of the judgment obtained from a transcript of the official shorthand writer's notes.

Lord Sterndale, in speaking of the action of the naval officer who intercepted the *Regina d'Italia*, used these words: "It "does not seem to me that it was necessary for him to

(1) [1920] P. 1; [1921] 1 A. C. 458.
(2) Ibid. 464.
(3) 9 Lloyd's P. C. 265.

"have had any information about copper or rubber or anything else to justify him in visiting the ship and, according to modern practice, if he were not satisfied, bringing her into Gibraltar in order that she might be searched, because, according to modern practice, it is admitted by everybody that search at sea is impossible. Therefore, so far as his action in bringing her into Gibraltar and having her visited and searched is concerned, it seems to me that he did not want anything to justify it." These words might seem to suggest that no suspicion is necessary to justify sending the *Mim* into Kirkwall for examination, and they were not criticized or indeed referred to in the judgment of the Privy Council in *The Bernisse* (1). The words "if he were not satisfied" do, however, in my view, indicate that the language of Lord Sterndale, taken as a whole, is not inconsistent with the judgment of the Privy Council in *The Bernisse* (1).

The position, in my view, may be fairly stated thus: In the absence of reasonable suspicion the ship must be allowed to proceed. If she is detained, for example, by mistake, as in *The Bernisse* (1), or if she is detained for some ulterior reason unconnected with search, the Crown cannot rely on the belligerent right of visit and search as an answer to the plaintiff's claim. The evidence of the boarding officer was that there was no examination of the hold, for that could not be done at sea. No question of mistake arises. It cannot be said that there was any ulterior object in sending her to Kirkwall, the purpose can, on the evidence, only have been that she might be examined. The owners anticipated that the *Mim* would be stopped and sent to Kirkwall, and did their best to obviate this cause of delay by giving instructions to communicate with the Admiralty that the Cereals Control Board had knowledge of the sale of the cargo. This attempt miscarried through an error in a telegram, and no information reached the Admiralty before the *Mim* was stopped.

The charterparty had a wide range of ports of discharge, including Hamburg, and the production of the licence from the Norwegian vice-consul at Las Palmas did not relieve the boarding officer of the duty of requiring the *Mim* to go to Kirkwall where examination could take place in the light of all available information and intelligence. The boarding officer found a neutral ship which admittedly had come further north than her usual course to Norway to

(1) [1920] P. 1; [1921] 1 A. C. 458.

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avoid being stopped. She had a cargo of grain on board which could not be examined at sea. He could hardly in those circumstances be satisfied even if the papers which he had seen appeared to be in order. He did not say that he was satisfied and the evidence shows that he was not.

In my judgment such reasonable suspicion existed as to justify the action taken. If, in such a case, a ship could not lawfully be sent to a convenient port for examination, the belligerent right of visit and search would be of little value. Therefore, the alternative claim of the plaintiff also fails and the petition will be dismissed with costs.

Petition dismissed.

Solicitors for the claimants: *Sinclair, Roche & Temperley.*
Solicitor for the defendants: *Treasury Solicitor.*

H. G.

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May 20.

Somervell L.J. and Hodson and Lynskey JJ.

Husband and wife—Divorce—Procedure—Alimony—Recovery of arrears —"Debt due"—Debtors Act, 1869 (32 & 33 *Vict., c.* 62), *s.* 5—*R. S. C. Or.* 41, *r.* 5.

Arrears of the payments directed by an order for alimony are a "debt due" within the meaning of s. 5 of the Debtors Act, 1869, and, accordingly, when the appropriate steps have been taken, are recoverable on a judgment summons. Such an order, in order to fall within that section, must show on its face with sufficient clarity that certain sums, either specified or readily ascertainable from the terms of the order itself, are payable within certain successive periods.

By an order of the court a husband was directed to pay his wife, pending determination of her petition for divorce, alimony "at "or after the rate of 118*l.* less tax per annum to commence from "the date of the service of the petition in this cause . . . . the "said sums to be payable monthly." Payments under that order being in arrear:—

Held, that the arrears were recoverable by way of judgment summons as a "debt due" under s. 5 of the Act of 1869, the order, as framed, being covered by the section; and that the order, as framed, made the dates at which instalments were payable sufficiently clear to constitute compliance with R. S. C. Or. 41, r. 5, and thus to render unnecessary, as a preliminary to the summons, any supplemental, or "four-day," order by the court.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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APPEAL from Wallington J.

On April 18, 1944, an order for alimony pendente lite was made in favour of the appellant, a wife petitioner for divorce, whereby the husband, the respondent to the present appeal, was directed to " pay or cause to be paid to the petitioner ali- " mony pending suit at or after the rate of 118*l.* less tax per " annum to commence from the date of the service of the " petition in this cause," a date being specified. The order further provided for maintenance of the two children of the marriage, and concluded, " the said sums to be payable " monthly." By a judgment summons dated December 2, 1946, the wife claimed 58*l.* 10*s.* 10*d.* arrears under the order, and on December 10, Wallington J., dismissed the summons without giving reasons.

The wife appealed. When the appeal came on for hearing on April 15, 1947, the husband appeared in person, and the court, after hearing counsel for the wife, adjourned the appeal in order that the King's Proctor might appear by counsel for the assistance of the court.

J. E. N. Russell for the wife petitioner. As the judge gave no reasons for dismissing the summons, it must be assumed that he thought that the wrong procedure had been adopted for the recovery of these arrears. He must, presumably, have thought either that such an obligation was not a " debt " due " within the meaning of s. 5 of the Debtors Act, 1869 (1), or that something in the nature of a four-day order under R. S. C. Or. 41, r. 5 (2), ought first to have been served on the husband. It is submitted that arrears of alimony are a " debt " due " within s. 5 of the Act of 1869 : see *Linton* v. *Linton* (3),

(1) By s. 5 of the Debtors Act, 1869 : " Subject to the provisions " hereinafter mentioned, and to " the prescribed rules, any court " may commit to prison for a term " not exceeding six weeks, or until " payment of the sum due, any " person who makes a default in " payment of any debt or instal- " ment of any debt due from him " in pursuance of any order or " judgment of that or any other " competent court . . . ."

(2) By R.S.C.Or. 41, r.5 : " Every " judgment or order made in any " cause or matter requiring any " person to do an act thereby " ordered shall state the time, or " the time after service of the " judgment or order, within which " the act is to be done, and " upon the copy of the " judgment or order which shall be " served upon the person required " to obey the same there shall be " endorsed a memorandum in the " words or to the effect " that if he neglects to obey the judgment or order within the time limited he will be liable to process of execution.

(3) (1885) 15 Q. B. D. 239, 246.

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applied in *Kerr* v. *Kerr* (1). The wife has no other means of recovering them, for an order for alimony does not create a legal debt recoverable in other ways : see per Luxmoore J., in *In re Hedderwick*; *Morten* v. *Brinsley* (2). [*In re Blanchard* (3) (illustrating the attitude of the court towards enforcement of its orders for alimony) ; *Nesom* v. *Metcalfe* (4) per McCardie J. ; *Reg.* v. *Brompton County Court Judge* (5) ; *In re a Judgment Debtor* (6) ; *Morse* v. *Muir* (7) ; and *In re Deakin* (8) referred to.]

Assuming that this was a debt due, to which the procedure of s. 5 was applicable, no further order to the debtor was, it is submitted, necessary before applying to the court, for the order is itself sufficiently specific.

Colin Duncan for the King's Proctor. It is submitted that the procedure followed on behalf of the wife here was correct. It would accordingly have been particularly desirable to have some indication of the judge's reasons for dismissing the summons. There is no case on record since 1869 where the procedure followed on this summons was challenged, and it has been followed in all three divisions of the High Court. Not only does a sum due under an order for alimony appear clearly to constitute a " debt due " to which the procedure of s. 5 is applicable, but the particular order made here specifies the time at which it is to be carried out, so that no further order before the issue of the judgment summons appears to have been called for.

SOMERVELL L.J. [after stating the facts :] The order for alimony was in a usual form, and we were referred to *Kerr* v. *Kerr* (1), where a form of order is set out which, like this one, provides for payment at an annual rate, the payments to be made monthly or at some shorter period. There is authority on the question whether a judgment summons, such as this, issued under s. 5 of the Debtors Act, 1869, is appropriate for sums claimed to be due under an order for alimony pendente lite. In *Linton* v. *Linton* (9), the main point argued was a different one, namely, the position with regard to sums due or to become due under an order of this court when the person against whom the order had been made was bankrupt ; but

(1) [1897] 2 Q. B. 439.
(2) [1933] Ch. 669.
(3) (1932) 48 T. L. R. 480.
(4) [1921] 1 K. B. 400, 407.
(5) (1886) 18 Q. B. D. 213, 217.
(6) (1935) 79 Sol. J. 625.
(7) [1939] 2 K. B. 106, 113.
(8) [1900] 2 Q. B. 478, 482.
(9) 15 Q. B. D. 239, 246.

in the course of his judgment Bowen L.J., said: "It appears "to me that arrears of alimony are, within the meaning of s. 5 "of the Debtors Act, 1869, 'a debt due in pursuance of an order "'or judgment of a competent court'." Bowen L.J., then referred to the history of the matter and to the Divorce and Matrimonial Causes Act, 1857, and continued: "Since the "Debtors Act was passed the proceeding by attachment has "fallen into disuse, and, unless payment of alimony can be "enforced under s. 5 of the Debtors Act, there seems to be "no way of enforcing it."

The matter again came before the court in *In re Hedderwick; Morten* v. *Brinsley* (1), where the husband against whom the order had been made had died and the question was whether it could be enforced against his estate. In the course of deciding that matter (indeed, I think that it was the basis of their decision), the court, to quote the headnote in the Law Reports, "held, following *Linton* v. *Linton* (2), that the only means by "which a wife can enforce payment of arrears of alimony is "under s. 5 of the Debtors Act, 1869." In the course of the judgment Luxmoore J. said (3): "In my reading of the cases "the order for alimony does not create a legal debt, but a "liability to pay which can only be enforced in one way, namely "by attachment under the Debtors Act." Those cases seem to me to be authority for the proposition that arrears under an order of this kind are enforceable, when appropriate steps are taken, under s. 5 of the Debtors Act, 1869.

It is unnecessary for us to consider the question whether, as is stated in the passages to which I have referred, that is the only means by which they can be enforced. Our attention has been drawn by counsel for the King's Proctor to observations of Bateson J., in *Capron* v. *Capron* (4), where he expressed the view that an order of this kind fell within the rule which provided for action by sequestration. A possible conflict, if that ever arises, seems to me to exist between what was said in the first two cases and what was there said by Bateson J. However, I will refer to that in another connexion later.

It being clear, in my view, that the arrears in question in this case were an obligation enforceable within s. 5 of the Debtors Act, 1869, the only question that remains is whether some further step ought to have been taken such as the issue of what is generally called a "four-day order." Counsel for the King's

(1) [1933] Ch. 669.
(2) 15 Q. B. D. 239.
(3) [1933] Ch. 675.
(4) [1927] P. 243, 246, 247.

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Proctor, having investigated the authorities on this matter and the other material to which the King's Proctor has access, informed the court that no such further steps have, in the past, been required either when the matter was before the judges in bankruptcy, or thereafter when the matter was transferred to the jurisdiction of the Probate, Divorce and Admiralty Division by Order made in 1932.

Apart altogether from the fact that it has not been done in the past, it is necessary to see how the matter arises. What is called a four-day order is usually issued in connexion with R. S. C. Or. 41, r. 5, and the four-day order is the order which it is necessary to serve when the order for payment omits to fix a time: the court makes a supplemental order and so regularizes the matter. Rule 62 (2.) of the Matrimonial Causes Rules, 1947, is in somewhat similar terms: "A decree or order requiring a person to do an act "thereby ordered shall state the time within which the act is "to be done, and the copy to be served upon the person required "to obey the same shall be endorsed with a notice in accordance "with Form 18 . . . ."

In the view which I take of the order in question here it does fix the time at which the various instalments are to be paid. I think that that is involved in the decisions, to which I have referred, that these orders are enforceable under s. 5 of the Debtors Act, 1869. I think that for an order to come within that section, it must, on the face of it, be expressed to show with sufficient clarity that certain sums, which either are set out or can be readily calculated from what is in the order, are payable within certain successive dates. That is the decision which, speaking for myself, I should have reached without any difficulty on the terms of the order; and it is also in accordance with what was said by Bateson J. in *Capron* v. *Capron* (1).

For these reasons I think that the judge was wrong in dismissing this summons on the ground either that the procedure was inappropriate or that some further step ought to have been taken before the procedure under s. 5 of the Debtors Act, 1869, could be invoked, and in my opinion the appeal should be allowed.

HODSON J. I agree. It appears to me that the judge took the view not that the procedure was wrong, but that, in view of the terms of the order for alimony, it was necessary, before

(1) [1927] P. 243.

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the order could be enforced by this procedure, that some further order should be made to perfect the original order for alimony, namely, something in the nature of a four-day order.

In that connexion it is important to observe that in *Linton* v. *Linton* (1), a decision of this court, it was decided that the procedure under the Debtors' Act, 1869, was appropriate in a case like this. It is to be noticed that the form of order in *Linton* v. *Linton* (2) was in similar terms to the order in this case, its material words being "permanent alimony at 1*l.* 15*s.* 0*d.* " per week payable monthly." No doubt seems to have been entertained by the members of the court that that order was of itself an order capable of being enforced under the procedure of the Debtors Act, 1869.

LYNSKEY J. I agree.

Appeal allowed.

Solicitors for the wife: *Robbins, Olivey & Lake.*
Solicitor for the King's Proctor: *Treasury Solicitor.*

(1) 15 Q. B. D. 239. (2) Ibid. 240.

Applied. WAY *v.* WAY [1950] P. 71

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Dec. 12, 13.

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Feb. 11, 12, 13, 19; *Mar.* 18.

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Husband and wife—Marriage—Nullity of marriage—Celebration by proxy—Forms and essentials of the marriage contract—Christian marriage—Public policy—Petitioner's English domicile and residence—Ceremony in Buenos Aires—Validity by lex loci—Petition of nullity dismissed.

The celebration of marriage by proxy is a matter of the form of the ceremony or proceeding, and not an essential of the marriage, there being nothing abhorrent to Christian ideas in the adoption of that form; in the absence of legislation to the contrary there is no doctrine of public policy by which such a ceremony, valid where it was performed, may be held to be ineffective in this country to constitute a valid marriage.

Wife's petition for nullity of marriage, in which it was pleaded "that the ceremony of marriage was performed in the "presence of the respondent only, and that the petitioner, "who was at that time in England, was represented by "a proxy acting under the authority of a power of attorney "executed in England."

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On January 19, 1941, while the petitioner was both resident and domiciled in this country, a celebration of marriage took place in Buenos Aires between the petitioner and the respondent. The petitioner was represented by a person whom she had named as her representative to contract the marriage under a power of attorney executed in London in November, 1940. The ceremony was valid and effectual by Argentine law. At the time of the ceremony both parties intended to make their home in the Argentine, but war-time restrictions prevented the petitioner from joining her husband. By the autumn of 1945 he had ceased to reply to her letters or to take steps to make the necessary arrangements for her journey to South America; and the petitioner came to the conclusion that the respondent had ceased to wish her to join him. She therefore brought this petition for nullity.

John Foster for the petitioner: Under Argentine law a marriage may be contracted by proxy. While a marriage good by the laws of the country of celebration is good anywhere, (*Berthiaume* v. *Dastous* (1)), a ceremony in which one of the parties is in the Argentine and the other in England is not a celebration of marriage according to English ideas. Where a person in this country is married by proxy in another country this is no marriage in England. The classification of the ceremony must be determined by English law: Cheshire: Private International Law, 2nd ed., pp. 24–45; and in English law the presence of both parties is an essential of the ceremony and not merely a matter of form.

A proxy marriage to which a British subject domiciled, resident, and actually present here purports to be a party is void as contrary to public policy since: (i.) Confusion would result from the liability to revocation of the power of attorney. (ii.) A party personally present in this country would be able to effect what would in fact be a clandestine marriage. (iii.) A minor would be able, without the necessary consent, to contract a valid marriage whilst personally present here. (iv.) The traffic in foreign prostitutes would be greatly facilitated. (v.) There is, properly speaking, no "Locus "contractus." (vi.) The Marriage Acts require the presence of both parties.

If this marriage were held to be valid, it would follow that two persons in England, who might both be minors, could

(1) [1930] A. C. 79.

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each execute a proxy for marriage in Mexico where the presence of neither spouse is required and thus marry clandestinely without parental consent. Further, marriage is an act of so peculiarly personal a nature that its performance cannot be delegated : *Commonwealth* v. *Farmers' and Shippers' Tobacco Warehouse Co.* (1). There is American authority that proxy marriage is invalid : *Re Lum Lin Ying* (2) ; though there is also authority for the opposite view : *Ex parte Suzanna* (3), *U.S. rel. Modianos* v. *Tuttle* (4). (Counsel also referred to *Brook* v. *Brook* (5) ; *R.* v. *Millis* (6) ; *Baindail* v. *Baindail* (7) ; *Nachimson* v. *Nachimson* (8) ; Swinburne's " Espousals," 1686; Fraser's " Husband and Wife," 2nd ed. ; Lorenzen's " Marriage " by Proxy and the Conflict of Laws," 32 Harvard Law Review, p. 489.

Colin Duncan for the King's Proctor. A marriage good by the laws of the country where it is effected is good all the world over : *Berthiaume* v. *Dastous* (9). The present marriage was admittedly good by the laws of the Argentine Republic. The form of a marriage is regulated by the lex loci contractus ; but the essentials of a marriage by the lex domicilii : *Brook* v. *Brook* (5). Marriage by proxy is a question of form not of essence. Marriages effected according to laws and forms alien to English notions have constantly been recognized : *Nachimson* v. *Nachimson* (8) ; *Dalrymple* v. *Dalrymple* (10) ; *Swifte* v. *A. G. of Ireland* (11). Even potentially polygamous marriages will be recognized in this country for some purposes ; *Baindail* v. *Baindail* (7). So far from proxy marriages being repugnant to Christian notions, they were recognized by Canon Law. According to Swinburne's Treatise on Spousals or Matrimonial Contracts, 1686, they were recognized by the common law of England. They are valid in certain states of the United States of America : *Modianos* v. *Tuttle* (4) ; *Ex parte Suzanna* (3). Professor Lorenzen, in 32 Harvard Law Review (p. 489), attributes this to the inheritance by the United States of the common law of England. Recognition

(1) (1899) 107 Kentucky 1, 52 ; S. W. Reporter 799.
(2) (1894) 59 Fed. Rep. 682.
(3) (1924) 295 Fed. Rep. 713.
(4) (1925) 12 Fed. Rep. (2nd series) 927.
(5) (1861) 9 H. L. C. 193.
(6) (1844) 10 Cl. & Fin. 534.
(7) [1946] P. 122.
(8) [1930] P. 217.
(9) [1930] A. C. 79.
(10) (1811) 2 Hagg. Con. 54.
(11) [1912] A. C. 276.

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of proxy marriages, therefore, is not contrary to public policy, which cannot be extended: *Janson* v. *Driefontein Cons. Mines, Ld.* (1). Any possibly undesirable results of such recognition should form the subject of legislation.

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1947. March 18. LORD MERRIMAN P. This is a wife's petition for nullity. On January 15, 1941, while the petitioner was in this country, she being not only resident but domiciled here, a ceremony of marriage was celebrated in Buenos Aires between the respondent and the petitioner. She was represented by a person whom, by power of attorney executed on November 8, 1940, in London, before a notary public, she had named as her representative to contract the marriage. It is proved that the ceremony was valid and effectual by the law of the Argentine, which recognizes proxy marriages, but the petitioner contends that it is not a marriage recognized by the law of this country. The question whether in these circumstances English law will recognize the celebration of a marriage by proxy as creating the status of marriage in this country is manifestly one of considerable public importance. There is, so far as I am aware, no English authority directly on the point. In these circumstances I invoked the assistance of the King's Proctor in the elucidation both of the facts and the law, and I wish to express my indebtedness to all concerned, and particularly to both counsel, for the way in which this case has been presented and argued.

The facts are as follows. Both parties were German nationals of Jewish origin. They were acquainted with each other when they were both living in Germany, but there was at that time no suggestion of marriage. In 1936 the husband emigrated to the Argentine as a refugee from the Nazi regime. In July, 1937, the wife, and other members of her family, came to England for the same reason. As regards the wife, it was admitted by the King's Proctor that she was at all material times domiciled in this country. The evidence on this point seems to me to be quite clear, and I so find. As regards the husband, whose domicile of origin was unquestionably Germany, it is quite clear from the evidence of the wife that his intention was to leave Germany for good. But I have no conclusive evidence that he had acquired

(1) [1902] A. C. 484, 491.

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a domicile of choice in the Argentine. There is no doubt, however, that he was still resident there, not only at the time of the ceremony of marriage but when the wife's petition dated December 4, 1945, was served upon him there. It is also clear from the wife's evidence that at the time of the celebration their mutual intention was to make the matrimonial home in the Argentine when circumstances permitted. That being so, it is conceded by counsel on both sides that for the purposes of my decision I can safely ignore any question of the husband retaining his domicile of origin, and can proceed upon the footing that he is domiciled in the Argentine. He has certainly lived there consistently since his flight from Germany and he not merely presented at the marriage ceremony the wife's power of attorney, in which he is described as domiciled in the Argentine, but he is so described in the marriage certificate. I do not ignore the possibility that the use of the word " domiciled " in these documents may not be conclusive but I think that there is sufficient evidence to justify me in holding, as I do, that the husband at all material times had acquired a domicile of choice in the Argentine.

In 1940 the husband wrote to the wife proposing marriage. At the time it was impossible for her to travel to the Argentine owing to war-time restrictions. Eventually, on the advice of Dr. F. M. Palacios, a Doctor of Laws in the Argentine, who gave evidence before me, she executed before a notary public the power of attorney dated November 8, 1940. The original, of course, has been filed in the Marriage Registry in Buenos Aires, and no copy was kept in this country, but I have a translation of a similar power of attorney executed four days earlier before another notary public, which for some reason (I think a misdescription of the proxy) it was impossible to use. I am assured that otherwise there is no material difference between the two documents. The power of attorney recites that before the notary public and the subscribing witness the wife, described as having been born in Berlin, in August, 1917, of named parents, domiciled at 71, Lindsay Drive, Kenton, of full age, single, capable, and known to the notary, appeared before him and said that she was engaged to be married to the husband, described as having been born in Berlin in June, 1916, the son of named parents, domiciled in Buenos Aires, Argentine Republic, at Sucre Street, No. 2923, single, whom she had known for many years, and that in order to contract that marriage she gave a special

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power to Mrs. Senta Goldglanz, née Gundermann, of a certain address, so that in her name and as her representative she should contract the marriage in Buenos Aires with the husband, and empowering her to sign in the wife's name the respective act of marriage, and any other document that might be necessary. As the marriage certificate shows, the proxy presented this power of attorney, and it is admitted that the marriage was thereupon duly celebrated in accordance with Argentine law.

The wife gave evidence, which I accept, that she had no intention of revoking the power of attorney; that she was informed in due course of the performance of the ceremony, that she was not merely ready and willing but eager to join the husband in Buenos Aires, and that she made repeated efforts to that end during the war, but that she was not allowed to leave England in spite of the marriage. Dr. Palacios proved that the husband had obtained a permit for her to enter the Argentine, but that this permit was not effective without the consent of the Argentine ambassador in London. He told me that he himself had applied to the ambassador personally for his consent, but that permission was refused on the ground that it was not convenient to allow a wife of German origin to enter the Argentine. After the war, the wife made further attempts to join her husband, but by the autumn of 1945, as the husband was no longer replying to her letters, and took no steps, in spite of her requests, to obtain or enable her to obtain a fresh permit, as was then required, she came to the conclusion that he had ceased to wish her to join him. She suggested a meeting in the United States, but this suggestion was also ignored. In these circumstances she decided to bring this petition.

I must now deal with the Argentine law on the subject as this was elucidated by Dr. Palacios. Owing to linguistic difficulties it was not always easy to be quite certain what the witness meant, but the main outlines are reasonably clear. He proved that the power of attorney used in this case was valid in Argentine law to enable the proxy to contract the marriage, and that the certificate of marriage based thereon was evidence of a valid marriage. As regards the Argentine law covering proxy marriages generally, he told me that it was permissible to insert conditions, for example that the marriage should be celebrated within a certain time limit, and that if, as here, no such time limit is expressed, the Registrar

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might ask for confirmation if the power of attorney was of old standing. Again, the power of attorney might contain conditions defining the town where the celebration should take place, as is the case here, or even defining the particular Registry Office and the day and hour at which the celebration should take place, or stipulating that certain relatives should be present; and he expressed the opinion that if any such conditions were not fulfilled the registrar would be obliged to refuse to perform the ceremony. But he seemed to me to be somewhat uncertain about conditions which he described as trivial, about which he thought that the registrar would have a discretion. By this I understood him to mean that, although the registrar might decide to allow the ceremony to go on, his decision about the essentiality of a particular condition would not be final but would be subject to review by the court. He gave some very important evidence on the subject of revocation. Here again there appeared at first to be some confusion in his evidence, but in the result it came to this: that the intending spouse could revoke the power of attorney at any time before the ceremony, but that if the power of attorney had been acted upon before either the other spouse or the proxy had notice of the revocation, the marriage would be valid. If, however, the spouse giving the power of attorney had meanwhile lost the capacity to contract the marriage, for example by an intervening marriage or by becoming of unsound mind, although the marriage certificate would be prima facie evidence of the ceremony having been performed, the court would declare the marriage null and void. The witness drew a clear distinction between revocation by operation of law through loss of capacity to contract the marriage, and revocation by the party. In the latter case he expressed and maintained the definite opinion that unless either the other spouse or the proxy had notice of the revocation before the ceremony, the marriage in Argentine law would be held to be valid. He put the case of the loss or miscarriage of a letter of revocation in the following words: "If the "proxy is revoked without any change of capacity and the "revocation is not known to the attorney or the husband "because the letter is lost in transit, a court would hold the "marriage valid. But if the revocation is due to a change "of capacity (for example marriage, or insanity) then the "court will hold that the marriage is void." I will revert to this point later in the judgment, as it is one upon which Mr. Foster laid great stress.

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Now, as to the English law, Lord Dunedin in *Berthiaume* v. *Dastous* (1) said : " If there is one question better settled than " any other in international law, it is that as regards marriage— " putting aside the question of capacity—locus regit actum. " If a marriage is good by the laws of the country where it " is effected, it is good all the world over, no matter whether " the proceeding or ceremony which constituted marriage " according to the law of the place would or would not " constitute marriage in the country of the domicile of one " or other of the spouses. If the so-called marriage is no " marriage in the place where it is celebrated, there is no " marriage anywhere, although the ceremony or proceeding " if conducted in the place of the parties' domicile would be " considered a good marriage. These propositions are too " well fixed to need much quotation."

This absolves me from any examination of the authorities for this proposition. But the crux of Mr. Foster's argument is that it is vital to determine what in relation to any marriage is merely, in Lord Dunedin's words, " proceeding or ceremony." In *Brook* v. *Brook* (2) the distinction between what are described as forms and essentials is fully discussed. That was a case in which the husband, a domiciled British subject, after the death of his wife went through a ceremony of marriage with her sister, also a domiciled British subject, in Denmark, where the marriage of a man with his deceased wife's sister was valid. Lord Campbell said (3) : " There can be no doubt of the " general rule, that ' a foreign marriage, valid according to the " ' law of a country where it is celebrated is good everywhere.' " But while the forms of entering into the contract of marriage " are to be regulated by the lex loci contractus, the law of the " country in which it is celebrated, the essentials of the " contract depend upon the lex domicilii, the law of the " country in which the parties are domiciled at the time of the " marriage, and in which the matrimonial residence is " contemplated. Although the forms of celebrating the foreign " marriage may be different from those required by the law of " the country of domicile, the marriage may be good every- " where. But if the contract of marriage is such, in essentials, " as to be contrary to the law of the country of domicile, and " it is declared void by that law, it is to be regarded as void " in the country of domicile, though not contrary to the law " of the country in which it was celebrated."

(1) [1930] A. C. 79, 83.
(2) 9 H. L. C. 193.
(3) Ibid. 207.

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It was held that the relationship between the spouses, being domiciled British subjects, was not a mere matter of form, but was of the essence of the marriage; and that marriage with a deceased wife's sister then being forbidden in this country, not because it was contrary to God's law, but because Parliament had declared it to be contrary to God's law (see Lord Campbell at p. 215, Lord Cranworth at p. 226, Lord St. Leonards at p. 233, and Lord Wensleydale at page 245) (1)—the relationship between the spouses was fatal to the validity of the marriage, notwithstanding the fact that in the country where the ceremony was performed the marriage was valid. In arriving at this conclusion the noble Lords examined several examples of the distinction between form and essence. For example, in discussing Gretna Green marriages, Lord Campbell said of Lord Hardwicke's Act (2): "But I do lay very great "stress on the consideration that Lord Hardwicke's Act only "regulated banns and licences, and the formalities by which "the ceremony of marriage shall be celebrated. It does not "touch the essentials of the contract or prohibit any marriage "which was before lawful, or render any marriage lawful "which was before prohibited. The formalities which it "requires could only be observed in England, and the whole "frame of it shows that it was only territorial. The nullifying "clauses about banns and licences can only apply to marriages "celebrated in England."

Again, referring to the case of the marriage of a minor in Scotland, where the marriage was valid by the law of Scotland though declared by an Irish statute to be absolutely null and void to all intents and purposes for lack of consent, Lord Campbell, in the same case (3), clearly regarded the lack of consent as being a matter of form and not of essence. But this class of case is contrasted (4) with incestuous marriages, and Lord Campbell was plainly of opinion that a marriage between a mulatto and a white woman prohibited by the law of Massachusetts, in which state the parties lived, ought to have been held to be invalid although the spouses went for the ceremony to the neighbouring province of Rhode Island, where such a marriage was valid. Lord Cranworth put the question thus (5): "that though in the case of marriages "celebrated abroad the lex loci contractus must quoad

(1) 9 H. L. C. 193.
(2) Ibid. 215.
(3) Ibid. 216.
(4) Ibid. 219.
(5) Ibid. 224.

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"solennitates determine the validity of the contract, yet no "law but our own can decide whether the contract is or is not "one which the parties to it, being subjects of Her Majesty "domiciled in this country, might lawfully make." Moreover, the passage in Mr. Justice Story's treatise on the Conflict of Laws, in which he specifies the exceptions to the rule that a marriage valid where celebrated is good everywhere was referred to with approval (1). He excepts marriages involving polygamy and incest, those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country. There was some criticism, however, of the sentence in which he lays down that in speaking of incestuous marriages care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are deemed incestuous. As has already appeared, all the noble Lords took the view that they were not so much concerned with the general consent of all Christendom, but rather with the fact that Parliament had declared what God's law on the subject was deemed to be in this country, and it was suggested that the particular case would most properly fall within the exception of a positive prohibition by the public law of this country from motives of policy; in other words, not as being incestuous in fact, but as being declared to be so by Parliament.

The question therefore is: into which category, form or essence, do proxy marriages fall? If they are to be likened to polygamous or incestuous marriages, or those positively prohibited by the public law of the country by motives of policy, the recent case of *Baindail* v. *Baindail* (2) establishes that the wife may obtain relief by a decree of nullity, although polygamous marriages are not otherwise recognized. But, as neither polygamy nor incest is in question, I am driven back to the question whether proxy marriages are positively prohibited by law by motives of policy. Mr. Foster concedes, of course, that the Marriage Acts have a territorial effect only, and that there is no express statutory provision against a domiciled British subject contracting a marriage by proxy out of this country. But he argues that at least as concerns a British subject domiciled and actually present in this country at the time of the ceremony, there is one matter as to which public policy points in the same

(1) 9 H. L. C. 208, 209. (2) [1946] P. 122.

direction as do the Marriage Acts, that is to say, the personal presence of both parties. This, he argues, is an essential, whatever form the ceremony itself may take.

The argument may be summarized as saying that the distinction between form and essence is not absolute, but that public policy requires certain essential ingredients in the ceremony or proceeding itself. Put in another way, that the classification of the ceremony, celebration, proceeding, or whatever word one may choose to describe the formality of the marriage contract, must be determined by the law of this country. For this he relies on the section on the problem of classification in Professor Cheshire's work on Private International Law, 2nd ed., p. 24, et seq. Manifestly, he argues, there may be certain primitive tribal marriage rites which could not possibly be classified in this country as being a marriage ceremony at all, because they would offend our conception of propriety. Likewise he suggests that the question whether the presence of both parties is essential to the classification of this ceremony as a ceremony of marriage must, at any rate in the case where one at least of the parties is domiciled and resident in this country at the time of the ceremony, be determined as a matter of public policy by English law. He enumerated the respects in which a proxy marriage offended public policy under the following heads.

First: The wife is entitled to change her mind up to the very last moment before the conclusion of the marriage contract, therefore it is contrary to public policy that when the power of attorney has actually been revoked before the ceremony the parties should be compelled to conclude the contract of marriage because the accident of delay by post, telegram or telephone prevents the communication of the revocation from reaching either the other party or the proxy in time.

Second: If the wife can do everything necessary to effect a valid marriage in the Argentine merely by signing a document in this country, her marriage, with all the attendant changes of domicile, nationality and status generally, is, so far as concerns this country, a clandestine marriage and therefore contrary to public policy. This point was emphasized by pointing to the possibility that both parties being resident in this country might contract a marriage by proxy in some country, the law of which entitled both parties to be represented by proxy at

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the ceremony. It was suggested that this is the case in Mexico (see Ringrose, Marriage and Divorce Laws of the World, p. 212) and it appears also to be the case in Portugal (p. 119). But, although this appears to be so as regards the actual ceremony or celebration, I gather from the work in question that the date and place of the celebration are only fixed after certain preliminary formalities have been completed, which seem to me to involve the presence in the country of at least one of the parties. However this may be, and I have no evidence on the subject, it only affords an extreme instance of the same point.

Third: Since it is well settled that in the case of a conflict of laws governing consent to the marriage of minors the question is one of form and the lex loci contractus is therefore decisive (*Brook* v. *Brook* (1)), it would follow that minors, either or both of whom were living in England, could evade parental control by marrying by proxy in a country where either the consent of the parents is unnecessary or where the age of majority is lower. It was admitted that it is open to English minors, if they were personally present in the country in question, though with the express intention of evading English law, to effect a valid marriage, but it was suggested that it was contrary to public policy that they should be able to do so by proxy, without the necessity of travelling.

Fourth: That the admission of a proxy marriage such as this would open the door much wider to the inward traffic in prostitution, since the husband in what are colloquially known as "Five-pound marriages," instead of being shipped abroad in order to go through the ceremony and bringing the wife into the country on his passport, could effect his purpose by simply signing a power of attorney here.

Fifth: That there is in truth no locus contractus in this case, seeing that the husband was present in the Argentine and the wife in England, and therefore that the public policy which, by the universal comity of nations, compels the recognition of a celebration valid by the lex loci contractus, does not apply.

Sixth: That the Marriage Acts of this country, including the Foreign Marriage Act, 1892, all require the presence of both parties at the ceremony, and therefore that this must be taken to be a declaration of the public policy of this country.

I will deal with the last two propositions first. The fifth

(1) 9 H. L. C. 193, 216.

seems to me to beg the question at issue, which is whether there is or is not a valid contract of marriage. If there is not, cadit quaestio. But in so far as the place where the ceremony or celebration took place is material, it is indisputable, and indeed it was not seriously disputed, that this was Buenos Aires. The power of attorney expressly empowers the proxy to contract a marriage in Buenos Aires in the wife's name and as her representative, and incidentally gives the proxy power to sign in the wife's name the act of marriage and any other document that may be necessary. The marriage certificate seems to me to be conclusive as to the place of celebration. As to the sixth, I have no doubt that the Marriage Acts, in common with public Acts of Parliament in general, declare the public policy of this country regarding their subject-matter. But, as is conceded, they have only territorial effect so far as concerns forms and ceremonies. The argument that such declarations of public policy operate universally seems to me to ignore the fact that public policy also demands, by virtue of the comity of nations, the recognition of marriages celebrated out of this country in accordance with forms and ceremonies in no wise conforming to those prescribed by the Marriage Acts.

As regards the second, third and fourth propositions, I recognize the possibility that the mischiefs depicted under these headings may arise from a judicial declaration in favour of this marriage. But if so, they are all matters which can be dealt with by the legislature. There is nothing whatever to prevent Parliament from enacting in relation to domiciled British subjects generally that proxy marriages shall not be recognized in this country wherever celebrated; or (leaving aside the point that a minor cannot give a power of attorney in this country: see *Oliver* v. *Woodroffe* (1)), that marriages by minors domiciled in this country, wherever celebrated, shall be invalid without the prescribed consent; or, more specifically, that the proxy marriage of a domiciled British subject, wherever celebrated, shall not be recognized for the purposes of immigration.

Before I deal with the first proposition, it will be well to deal generally with the question of public policy in relation to all these heads. It was laid down by the House of Lords in *Janson* v. *Driefontein Consolidated Mines, Ld.* (2) that public policy is not a safe or trustworthy ground for legal decision. In an oft-quoted passage, Lord Halsbury says (3): " . . . .

(1) (1839) 4 M. & W. 650.
(2) [1902] A. C. 484.
(3) Ibid. 491.

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" but I deny that any court can invent a new head of public " policy." This sentence was the subject of adverse comment by McCardie J. in *Naylor Benzon & Co., Ld.* v. *Krainische Industrie Gesellschaft* (1), but it seems to me that such force as this criticism may have depends entirely upon what Lord Halsbury intended by the words " new head " of public policy. Lord Halsbury goes on (2): " . . . . so a contract " for marriage brokerage, the creation of a perpetuity, a " contract in restraint of trade, a gaming or wagering contract, " or, what is relevant here, the assisting of the King's enemies, " are all undoubtedly unlawful things; and you may say " that it is because they are contrary to public policy they " are unlawful; but it is because these things have been " either enacted or assumed to be by the common law unlawful, " and not because a judge or court have a right to declare " that such and such things are in his or their view contrary " to public policy. Of course, in the application of the " principles here insisted on, it is inevitable that the particular " case must be decided by a judge; he must find the facts, " and he must decide whether the facts so found do or do not " come within the principles which I have endeavoured to " describe—that is, a principle of public policy, recognized " by the law, which the suggested contract is infringing, or is " supposed to infringe."

I ask myself, therefore, what principle of public policy, recognized by the law, this suggested contract infringes or is supposed to infringe. It is, of course, necessary to bear in mind the distinction in the use of the word " marriage " between the contract itself and the status created by the contract—(see *Niboyet* v. *Niboyet* (3), per Brett L.J., and per Sir James Hannen P., in *Sottomayer* v. *De Barros* (4)). As regards the status, there can be no question, in my opinion, that what was intended to be created in this case was a Christian marriage within Lord Penzance's definition in *Hyde* v. *Hyde* (5) as being " the voluntary union for life of one " man and one woman, to the exclusion of all others." This definition has repeatedly received judicial approval, recent instances of which are *Rex* v. *Hammersmith Superintendent Registrar of Marriages* (6) and *Nachimson* v. *Nachimson* (7) both decided by the Court of Appeal.

(1) [1918] 1 K. B. 331, 342.
(2) [1902] A. C. 484, 491.
(3) (1878) 4 P. D. 1, 11.
(4) (1879) 5 P. D. 94, 101.
(5) (1866) L. R. 1 P. & M. 130, 133.
(6) [1917] 1 K. B. 634.
(7) [1930] P. 217.

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What is in question here, therefore, is the form of contract. By this contract a woman domiciled in this country wished to assume the character of the wife of a foreign husband. Lord Selborne's words in *Harvey* v. *Farnie* (1), ... " the marriage " is contracted with a view to that matrimonial domicile " which results from her placing herself by contract in relation " of wife to the husband whom she marries, knowing him to " be a foreigner, domiciled and contemplating permanent " and settled residence abroad," describe this case exactly. I ask myself, therefore, what public policy is infringed by the wife adopting a form of contract lawful in that country. Had she gone to the Argentine and had there signed a power of attorney enabling her to be represented at the ceremony by proxy, the case would be covered expressly by Lord Dunedin's words, ... " no matter whether the proceeding or ceremony " which constituted marriage according to the law of the " place would or would not constitute marriage in the country " of the domicile of one or other of the spouses," in the passage from his opinion in *Berthiaume* v. *Dastous* (2) which I have already quoted. In her case, therefore, the issue as to public policy is reduced to the question whether or not she should be allowed to sign the power of attorney here. But it is said that in considering whether or not the subject-matter is contrary to public policy one must look at the problem as a whole and not allow one's self to be influenced by the fact that in individual cases no harm, or even benefit, may accrue. As a general proposition that is, no doubt, true ; but I am by no means satisfied that the problem here is one and indivisible, and embraces proxy marriages as a whole. It may well be that the problem should be sub-divided into categories and the test of public policy be applied, if at all, to each category separately. For example, the converse case of the husband in the Argentine being a domiciled Englishman and intending to make the matrimonial home here, and the case of a minor domiciled in this country, where the law does not permit him to give a power of attorney at all, seem manifestly to call for separate consideration, as does the case, which I will consider shortly, of the revocation of the power of attorney before the ceremony. I do not think that it is necessary to pursue this topic further than to say that I am not satisfied that a single test of public policy can be applied to all proxy marriages indiscriminately.

(1) 8 App. Cas. 43, 50. (2) [1930] A. C. 79, 83.

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Undoubtedly proxy marriages are liable to abuse, but as I have already said, if these abuses occur or are apprehended they can be prevented or cured by legislation. The objection that clandestine marriages may be promoted appears to me to go too far, in view of the fact that Gretna Green marriages were tolerated for years in spite of their notorious abuse for the very purpose of evading the Lord Hardwicke's Act, which was expressly directed to the preventing of clandestine marriages, and incidentally of evading the restrictions on the marriage of minors. It is true that after 1856 the condition of residence for twenty-one days was imposed by the Act Amending the Law of Marriage in Scotland, 1856, and that by the recent Marriage (Scotland) Act, 1939, s. 5, irregular marriages in Scotland are abolished. So slow a process of legislation to deal with abuses not less glaring than anything that is likely to result from the recognition of a proxy marriage such as this seems to call for caution in invoking the doctrine of public policy in this connexion, and emphasizes the point that the matter is one to be dealt with by legislation.

I will deal next with the suggestion that it is a matter of public policy that both parties should be present. It seems to me that it is hardly possible to base this argument on the principle that the presence of both parties at the celebration is necessary for a Christian marriage. It is not disputed that proxy marriages were recognized by the canon law. In Swinburne's "Treatise of Spousals or Matrimonial Con-"tracts," 1686, pp. 162, 163 the conditions of a valid proxy marriage are described. Moreover, proxy marriages are recognized not only in the Argentine but in other Christian countries, such as Portugal and Spain. Also, in the United States of America, where the regulation of marriage and divorce remains within the jurisdiction of individual States, the validity of proxy marriages has been recognized. As a result of Mr. Foster's industrious researches I have had the advantage of considering many reported cases decided in various States of the Union. Most of these arise out of the immigration laws. They are none the less important for that reason, for, as Lord Campbell said in *Brook* v. *Brook* (1) some very important social questions have arisen on cases raising the kindred question of the settlement of the poor. Mr. Foster quoted from *Commonwealth* v. *Warehouse Company* (2) the following

(1) 9 H. L. C. 193, 219.

(2) (1899) 107 Kentucky, 1, 52; S. W. Reporter, 799.

dictum : " There are acts of so peculiarly personal a nature " that their performance cannot be delegated. To this class " of cases belong the making of wills and the contracting of " marriages." The immigration cases show that the generality of this dictum requires considerable qualification.

In *In re Lum Lin Ying* (1), decided in the District Court of Oregon, it was held that a marriage solemnized in China according to the laws and customs thereof, but while the bridegroom was in America, was not valid in America. The decision, however, appears to turn not upon any dissent from the proposition that a marriage which is valid in the place where it is contracted is valid everywhere, but upon a doubt whether China was in fact the place of solemnization of the marriage. Apparently the parties had been betrothed when the bride was two years of age ; in accordance with Chinese customs the marriage was arranged by professional go-betweens with the parents and families of the respective parties. The particulars of the engagement were committed to writing upon duplicate cards, and the ceremony was completed by sewing the cards together, whereupon the bride attempted to join her husband, who was all the time domiciled in the United States. The district judge expressed a doubt whether this was a Chinese marriage. He said that it was not enough that such a marriage was valid under the laws of China, but was of opinion that it must not only be valid under such laws, but to be valid elsewhere must have been solemnized within the jurisdiction of those laws ; but he made an order allowing the wife's admission on the ground that the parties had acted in good faith. I do not think that this decision, depending as it does on the question whether there could be said to be a solemnization in China, affords much guidance in the present case.

More directly in point is *Ex parte Suzanna* (2), decided in the District Court of Massachusetts. The husband was resident in Pennsylvania. By the relevant Act it was provided that an illiterate woman over sixteen years of age should not be admitted unless she was, amongst other things, the wife of an admissible or domiciled alien or a citizen. The wife was resident in Portugal at the time of the alleged marriage. The marriage was by proxy and Portuguese law recognizes proxy marriages. Presumably it was the husband who was represented by proxy at the ceremony in Portugal, though this

(1) 59 Fed. Rep. 682. (2) 295 Fed. Rep. 713.

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fact is not expressly stated except by inference from the statement in the last sentence of the judgment that the proxy marriage was celebrated in Portugal. On the ground that the question must be decided on the law of Pennsylvania, where it was well settled that a common law marriage was valid, and that nothing in the law of Pennsylvania required the personal presence of the parties at the ceremony, the learned judge decided that the petitioner had the right to admission as a wife.

An even stronger case is *United States ex rel. Modianos* v. *Tuttle* (1). In this case, decided in the New Orleans Division of the District Court of Louisiana, the husband, born a Turkish subject, but at the time of the celebration of the alleged marriage in 1922 a naturalized American citizen domiciled in the State of Louisiana and actually in New Orleans, was represented at the ceremony in Turkey by proxy, proxy marriages being valid in Turkey. The revised civil code of Louisiana expressly declares, "No marriage can be "contracted or celebrated by procuration." The district judge held that this prohibition only applied to marriages celebrated in the State, while at the same time he held that the State legislature had the right to declare what marriages would be recognized, regardless of whether the participants were domiciled within or without the State, and that a statute invalidating proxy marriages, wherever performed, would be valid. In the absence of any such legislation, he held that the particular marriage was valid, and that the wife was entitled to admission as such, regardless of the question whether the quota of Turkish immigrants had been exhausted or not. It is interesting to note that the learned judge expressly held that there was nothing in the circumstances of this marriage conflicting with the views of Christendom, and that he was also of opinon that if it was desired to except from the general principle that marriages celebrated in accordance with the lex loci contractus are valid everywhere, a marriage by proxy celebrated out of the particular State, it was for the State legislature so to enact.

The fact that it was conceded that no American case has been found conflicting with this decision, which obviously is directly in point, absolves me from the necessity of any further examination of American cases. It is clear, however, not only from the cases cited but from the learned article by Professor

(1) 12 Fed. Rep. (2nd series) 927.

E. G. Lorenzen in 32 Harvard Law Review at p. 489, that the view is held in America that the common law inherited by certain States of the Union at the time of their settlement enabled a marriage to be contracted per verba de praesenti, or per verba de futuro followed by consummation. See also the argument in *Rex* v. *Millis* (1). That a proxy marriage can take either form appears from Swinburne at p. 164; and see sections X. and XI. of the same work. It has been accepted throughout the argument, and I think rightly, that this marriage was celebrated, if at all, per verba de praesenti, and that the question of consummation is, therefore, irrelevant. But whatever view may be held in America, I think that I am precluded by the actual decision in *Rex* v. *Millis* (1) from holding that the common law ever recognized the validity of a marriage per verba de praesenti unless celebrated before an episcopally ordained priest. Nevertheless the point seems to me to be that it is difficult to assert that a marriage ceremony expressed to be recognized by the canon law and adopted in civilized countries with a long Christian tradition is so essentially abhorrent to Christian ideas as to take a proxy marriage out of the category of ceremony or proceeding, and to classify it with incest or polygamy.

Reliance was also placed on the passage in Lord Fraser's work on "Husband and Wife," 2nd ed., p. 319: "Suppose "an offer of marriage is sent through the post office from "Scotland, and an acceptance sent by return of post from "England, it is obvious that there could be no marriage in "such circumstances, because marriage cannot be entered "into in England merely by a declaration of present consent. "If marriage can be entered into after this fashion, the two "parties must be in Scotland at the time." But the question is not the same as is raised in this case. The wife did not purport to constitute the marriage by the power of attorney signed here. She merely authorized her proxy to constitute it on her behalf in the Argentine.

This brings me to a consideration of the first proposition. The objection based upon the Argentine law regarding revocation of the power of attorney seems to me to be the most formidable argument against the validity of the marriage. In the section entitled "Of Contracting Spousals either betwixt "Parties Present or Absent" Swinburne, in para. 22, on p. 165, says: "Furthermore, it is not only necessary that

(1) 10 Cl. & F. 534, 545.

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"the proxy be sufficient, and that the contract be made in "due form, as aforesaid; but it is requisite also that the "party which did constitute the Proctor, do persevere and "continue in the same mind and purpose, until the contract "be finished; for if he repent in the mean time, or revoke "his Proctor (which thing is lawful for him to do though he "has covenanted, yea and sworn not to revoke him) the "contract is utterly void, which conclusion hath place, albeit "the Proctor were *ignorant* of the parties repentance or "revocation of the proxy, seeing the perseverance and "continuance of the parties consent, which did constitute, "is so necessary, as without the which the contract is not "of any force." There is a passage to the same effect with regard to contracting matrimony by letter in para. 39, on p. 182. Swinburne died in 1623, and his book was first published posthumously in 1686. That he was an ecclesiastical lawyer of repute appears from the Dictionary of National Biography, vol. LV. at pp. 228 and 229.

Now manifestly in the case of the revocation of a power of attorney like the present, the communication of which for whatever reason has miscarried, it would not be true to say that the party giving it still continued in the same mind without alteration until the time of the other's consent. That is to say, the Argentine law differs from the canon law, as expressed by Swinburne, in this respect. The question as I see it is whether this objection applies to the validity of proxy marriages in general, or only to the validity of those which are actually affected by the Argentine law regarding revocation. No such question arises, as has already been said, in this case. Supposing, however, that had been the situation in this case. I incline to the opinion that the marriage would not be a Christian marriage as defined by Lord Penzance in *Hyde* v. *Hyde* (1), which I have already quoted. The case might be put as follows: The wife was a domiciled British subject when she gave the power of attorney; this is not expressed to be irrevocable; although her intention at the time she gave it was to contract a Christian marriage and to acquire the husband's domicile when the marriage was celebrated, she changed her mind and revoked the power of attorney before the celebration, while she was still a British subject; and the marriage ceremony, therefore, did not effect a "voluntary" union but only a union which

(1) L. R. 1 P. & M. 130, 133.

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is deemed to be voluntary by the law of a country to which she was not subject at the time of the revocation of the power of attorney; and, that being so, the effect of the revocation should be decided according to English law. I do not think that it is necessary or desirable for me to decide that point. Suffice it to say that the manifest distinction between that case and the present points strongly against there being one test of public policy with regard to all proxy marriages alike, and towards the propriety of the definition by Parliament of the conditions in which proxy marriages shall or shall not be recognized.

My conclusions therefore are: that the contract of marriage in this case was celebrated in Buenos Aires; that the ceremony was performed strictly in accordance with the law of that country; that the celebration of marriage by proxy is a matter of the form of the ceremony or proceeding, and not an essential of the marriage; that there is nothing abhorrent to Christian ideas in the adoption of that form; and that, in the absence of legislation to the contrary, there is no doctrine of public policy which entitles me to hold that the ceremony, valid where it was performed, is not effective in this country to constitute a valid marriage. For these reasons, whatever may be the petitioner's remedies as a wife, I am obliged to hold that this petition must be dismissed.

Petition dismissed.

Solicitors for the petitioner: *Hardmann, Phillips & Mann.*
Solicitor for the King's Proctor: *The Treasury Solicitor.*

J. B. G.

COHEN *v.* COHEN.

C. A.

1947
May 22.

Somervell L.J. and Hodson and Lynskey JJ.

Husband and wife—Divorce—Desertion—Magistrate's maintenance order—Non-cohabitation clause included by inadvertence—Effect on period of desertion.

A wife having taken out a summons against her husband for wilful neglect to maintain, the magistrate made an order for the maintenance of her children and herself. The non-cohabitation clause in the printed form of order was, by inadvertence, not struck out. Some years later, on the husband's application, the order was, with the wife's consent, rectified by a different magis-

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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trate of the same court by striking out the non-cohabitation clause. The minutes of adjudication of the earlier proceedings showed that the magistrate had never intended to make a separation order. Eighteen months after the rectification of the order, the husband presented a petition for divorce, alleging desertion by his wife. The commissioner was of opinion that the period of alleged desertion could not run while the order containing the non-cohabitation clause was in force, and that, as only eighteen months had elapsed since its rectification, the husband had failed to prove the requisite three years' desertion immediately preceding presentation of the petition. He accordingly dismissed the petition. On appeal by the husband,

Held, that the non-cohabitation clause, having been included in the magistrate's order per incuriam, was void ab initio; that the magistrate's order had, therefore, never operated as a separation order; and that that order had accordingly never operated to prevent the wife from being in desertion.

Quaere, what the effect would have been had any person concerned relied or acted upon the order as being a separation order before its rectification.

Rex v. *Lanyon* (1872) 27 L. T. 355 applied.

Mackenzie v. *Mackenzie* [1940] P. 81 distinguished.

Aron v. *Aron* [1939] W. N. 402 n. approved.

Decision of Mr. Commissioner Grazebrook reversed.

APPEAL from Mr. Commissioner Grazebrook.

The appellant husband and the respondent wife were married in 1925. In 1937 the wife took out a summons at Old Street police court, alleging wilful neglect to maintain, and the magistrate made an order against the husband for the maintenance of the wife and their children. The printed document embodying that order contained a non-cohabitation clause which, by an error, was not struck out. In 1944, on the husband's application to the court to have the clause struck out, the wife being represented, the magistrate, not being the magistrate who had made the original order, endorsed that order with the words "this formal order corrected by "striking out the non-cohabitation clause which had in-"advertently been left in." The court record of the proceedings of 1937 showed that the magistrate had made only a maintenance order in favour of the wife and children. Some eighteen months after the magistrate's order had been rectified, the husband presented a petition for divorce on the ground of his wife's alleged desertion. The petition was not defended. The Commissioner dismissed the petition, holding that, as a wife could not be in desertion while a separation order was in being, the period of desertion could not run before the rectification of the order, with the result that the

wife had not, in his opinion, been in desertion for the requisite three years immediately preceding the presentation of the petition.

The husband appealed.

F. Whitworth for the husband.

The wife did not appear, and was not represented.

SOMERVELL L.J. [after stating the facts]: It is clear from the minutes of adjudication that all that the magistrate did was to make a maintenance order in favour of the wife and children.

It was laid down in *Reg* v. *Lanyon* (1), which concerned a bastardy order, that what the magistrates say and the order which they themselves make at the conclusion of the proceedings is effective. The document which is subsequently drawn up is evidence, and normally accurate evidence, of what was said. In that case an order was drawn up which, by mistake, was not accurate. It was held that the justices were entitled to draw up a second order embodying the correct terms of the original adjudication, and that the first order or document was a nullity.

It seems to me clear that in the present case the words in the order were a nullity, and that no separation order had been made. There is no evidence that anyone has relied or acted upon the order as at first drawn up. I must reserve my decision as to what the result would have been if this had been the case. Here the words of the separation order were void ab initio. The Commissioner took the view that the words, until they were struck out, were effective to prevent the necessary period of desertion from running. I do not agree.

There is no finding by the Commissioner with regard to the question of desertion and no satisfactory evidence of when the wife left or of the circumstances in which she came to leave. This point about the order having been taken by the Commissioner, it would be right in the circumstances to order a new trial and give the husband an opportunity of tendering evidence as to the desertion. The line which the court is taking in this matter is that taken by Hodson J., in *Aron* v. *Aron* (2).

HODSON J.: The Commissioner relied on *Mackenzie* v. *Mackenzie* (3) and *Harriman* v. *Harriman* (4), holding that

(1) (1872) 27 L. T. 355.
(2) [1939] W. N. 402 n.
(3) [1940] P. 81.
(4) [1909] P. 123.

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a non-cohabitation clause in a magistrate's order was sufficient to prevent desertion from running as from the date of the order, although here the clause was subsequently struck out. In giving his decision the Commissioner said: "It is said that "a separation order was not asked for, but, whether it was "or not, it is quite clear from the decision of the Court of "Appeal in *Mackenzie* v. *Mackenzie* (1) that there can be no "desertion while such an order exists." He did not apply his mind to the vital question whether there was a separation order at all. On investigation, it is clear that no such order was made and that the clause in the printed form was included by mistake. In the circumstances there never was a separation order in my view, and the Commissioner put an obstacle in the way of the husband which ought not to have been there.

The Commissioner did not make any express finding as to desertion. We have been asked to make such a finding on the evidence of the husband. That evidence is entirely uncorroborated, although there are signs that corroboration could have been obtained from members of the family. All that the court knows is that in litigation undertaken at the time the wife was the successful party. It therefore seems fair that, since the Commissioner has decided the case on the short point without considering the evidence in detail, there should be a rehearing.

LYNSKEY J.: I agree. On September 10, 1937, the magistrate made an order for maintenance. His effective order was not that set out in the printed form, but the order in the court records which have been produced to us. When the order came to be drawn up, by some mistake a non-cohabitation clause was included in it. This was brought to the notice of the magistrate's court in 1944, when, as a result of their investigations, the printed order was amended by striking out the non-cohabitation clause which ought never to have been in. The Commissioner did not address his mind to this aspect of the matter, but took the view, based on *Mackenzie* v. *Mackenzie* (1), that the order would be a bar to proceedings based on desertion as long as the non-cohabitation clause was left in, even if the order were rectified before the petition was presented.

I desire not to be understood as saying that in every case

(1) [1940] P. 81.

where an order is amended by striking out a non-cohabitation clause the result will be as in this case ; but where the original non-cohabitation clause is included per incuriam it is of no effect. If the original order had been made as a result of an application for a separation order and the clause subsequently struck out as a result of another application, then the clause would be valid until so struck out.

The Commissioner did not reach a conclusion on the question of desertion. Speaking for myself, I should have found the evidence somewhat unsatisfactory. In these circumstances, in view of our decision that the court of first instance was in error in law, this court orders a new trial at which it will be open to the husband to bring such further evidence as he can in support of his plea of desertion.

Appeal allowed.
Order for new trial.

Solicitors for the husband : *Mackover & Co.*

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1947
June 9, 16.
Willmer J.

Divorce—Consent order embodied in decree nisi—petitioner to " secure " to respondent for her life occupation " of their freehold house theretofore held by respondent and petitioner as joint tenants on trust for sale—Strict settlement—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-ss.* 1, 7 ; *s.* 19, *sub-s.* 1—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192—*Matrimonial Causes Act*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 10, *sub-s.* 1.

When once the court has pronounced a decree nisi of divorce, it has power under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925 (1), as amended by s. 10, sub-s. 1 of

(1) Supreme Court of Judicature (Consolidation) Act, 1925, s. 192 : " The court may after pronouncing " a decree for divorce or for nullity " of marriage enquire into the " existence of ante-nuptial or post- " nuptial settlements made on the " parties whose marriage is the " subject of the decree, and may " make such orders with reference " to the application of the whole or " any part of the property settled " either for the benefit of the chil- " dren of the marriage or of the " parties to the marriage, as the " court thinks fit, and the court " may exercise the powers con- " ferred by this sub-section not- " withstanding that there are no " children of the marriage."

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the Matrimonial Causes Act, 1937 (1), to vary the application of property the subject of a post-nuptial settlement, such order to become operative on decree absolute; and when once the court has such power it is open to the parties to agree, subject to the approval of the court, what order should be made. An order so made by consent may constitute an "agreement" between the parties within the terms of s. 1, sub-s. 1, of the Settled Land Act, 1925 (2), so as to create a strict settlement of land under that section as amended by the Law of Property (Amendment) Act, 1926.

Accordingly, where such a consent order secures to one of the parties for life a paramount right to occupy in specie a freehold property theretofore held by both parties in fee simple as joint tenants upon trust for sale, the effect thereof is to constitute that party a tenant for life of the property under s. 19, sub-s. 1, of the Settled Land Act, 1925, and as such entitled to call for the legal estate to be vested in that party as estate-owner, on the trusts of the strict settlement. The trust for sale in the original conveyance becomes postponed to the life interest so created, ceases to be "immediate" within the meaning of the Law of

(1) Matrimonial Causes Act, 1937, s. 10, sub-s. 1: "When a "petition for divorce or nullity of "marriage has been presented, "proceedings under s. 190, 191, "192 or sub-s. 3 of s. 193, of "the principle Act . . . . may, "subject to and in accordance "with rules of court, be com- "menced at any time after the "presentation of the petition:

"Provided that no order under "any of the said sections . . . . "shall be made unless and until a "decree nisi has been pronounced, "and no such order, save in so far "as it relates to the preparation, "execution or approval of a deed "or instrument and no settlement "made in pursuance of any such "order, shall take effect unless "and until the decree is made "absolute."

(2) Settled Land Act, 1925, s. 1, sub-s. 1: "Any deed, will, "agreement for a settlement or "other agreement . . . . or other "instrument, or any number of "instruments, whether made "before or after, or partly before "and partly after, the commence- "ment of this Act, under or by "virtue of which instrument or "instruments any land, after the "commencement of this Act, "stands for the time being— "(i.) limited in trust for any "persons by way of succession "[illegible] creates or is for the "purposes of this Act a settle- "ment . . . ."

Sub-section (7) (incorporated in s. 1, by the Law of Property (Amendment) Act, 1926, s. 7 and schedule): "This section does not "apply to land held upon trust "for sale."

Section 19, sub-s. 1: "The per- "son of full age who is for the time "being beneficially entitled under "a settlement to possession of "settled land for his life is for "the purposes of this Act the "tenant for life of that land and "the tenant for life under that "settlement."

Section 117, sub-s. 1 (xxx): ". . . . trust for sale . . . . has "the same meaning as in the Law "of Property Act, 1925."

Property Act, 1925, s. 205, sub-s. 1 (xxix) (1) and the Settled Land Act, 1925, s. 1, sub-s. 7, and does not preclude the application of the Settled Land Act, 1925, to such a state of affairs.

SUMMONS ADJOURNED into court.

The following order was made by Denning J. in December, 1945, on pronouncing a decree nisi of dissolution: "It is "further ordered (by consent) that the petitioner, the husband, "do secure to the respondent, the wife, for her life occupation "of the house at . . . ."

The house in question was purchased by the parties in April, 1941, out of moneys belonging to them on a joint account, and was conveyed to them to hold in fee simple as joint tenants upon trust for sale, with power to postpone sale, and as to the net proceeds of sale and the net rents and profits until sale in trust for themselves as joint tenants beneficially.

The decree nisi was made absolute in November, 1946, and a dispute arose concerning the nature of the deed or instrument which should be executed by the parties in order to give effect to the agreement embodied in the consent order, with regard to the occupation of the house.

R. L. Travers (for *D. A. Fairweather*) for the husband.
W. T. Elverston for the wife.

Cur. adv. vult.

June 16. WILLMER J. read the following judgment. The dispute which has arisen concerns the nature of the deed or instrument which should be executed by the parties in order to give effect to the agreement of the parties with regard to the occupation of the house, as embodied in the consent order made by Denning J. The question is whether or not the effect of the consent order is to create a strict settlement within the meaning of the Settled Land Act, 1925. In view of the nature of the questions which arose I thought it right to adjourn the matter into court for argument, and I have taken time to consider my judgment.

The argument for the wife was that, whatever the parties may have contemplated or intended at the time, the effect of the consent order made by Denning J. was to create a settlement under the Settled Land Act—i.e., a beneficial interest to

(1) Law of Property Act, 1925, s. 205, sub-s. 1 (xxix): "Trust for "'sale,' in relation to land, means "an immediate binding trust for "sale, whether or not exercisable "at the request or with the consent of any person, and with or "without a power at discretion to "postpone the sale . . . ."

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the wife for life, with remainder to the husband and wife as joint tenants. The only proper way, therefore, of giving effect to the consent order would be by way of the appropriate vesting deed and trust instrument under the Settled Land Act, drafts of which were submitted for my consideration. For the husband, on the other hand, it was contended that the effect of the consent order was not such as to create a settlement under the Settled Land Act, with all the consequences which would follow from that, but that its effect was intended to be limited to what it says, namely, that the husband should secure to the wife for her life occupation of the house, no more and no less. It was suggested that effect could be given to the order by means of a deed, whereby the house would be conveyed to trustees upon trust to sell, with a proviso that they should not sell during the lifetime of the wife without the consent of both parties; it should also be provided that so long as the house remained unsold the trustees should permit the wife to occupy it, and upon its eventual sale they should hold the proceeds in trust for the husband and wife equally. A draft deed was submitted, which, with certain drafting amendments admittedly necessary, would achieve this result.

The crucial question which I have to determine is whether the consent order made by Denning J. amounted to an "agreement," or alternatively, an "other instrument," so as to create a settlement, within the meaning of s. 1, sub-s. 1, of the Settled Land Act, 1925. If there is a settlement within the Act, it was argued on behalf of the wife, and not disputed by the husband, that the effect of conferring a right to occupy for life would be to create a life tenancy. This seems to be the plain effect of s. 19, sub-s. 1, of the Act, and the wife's contention is also supported by the decisions in *In re Carne's Settled Estates* (1), and the other later cases which were cited to me. It was also contended for the wife, and not disputed by the husband, that if a life tenancy in favour of the wife were created, this would take priority over the trust for sale contained in the original conveyance, so that s. 1, sub-s. 7, could not be relied on to exclude the operation of the Act.

I was referred to the decisions of the Chancery Division in the cases of *In re Norton* (2), *In re Sharpe's Deed of Release* (3) and *In re Hanson* (4). Having regard to these decisions, and to the definition of trust for sale in the Law of Property Act,

(1) [1899] 1 Ch. 324.
(2) [1929] 1 Ch. 84.
(3) [1939] 1 Ch. 51.
(4) [1928] 1 Ch. 96.

I am satisfied that the argument for the wife on this point is well founded—namely, that if a life tenancy were created in consequence of the consent order, the trust for sale in the original conveyance would be postponed thereto, and could not, therefore, operate to exclude the Settled Land Act.

I come back, therefore, to the vital question in this case. Was the consent order an " agreement " within the meaning of s. 1, sub-s. 1, of the Act ? I would say, in passing, that I think counsel for the husband was well founded in submitting that what was done by Denning J., when he made his consent order, was done, and could only have been done, in the exercise of the powers conferred by s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925—i.e., the power to vary the application of property the subject of a post-nuptial settlement. In *Smith* v. *Smith* (1), where a house was purchased in the joint names of husband and wife in circumstances similar, and upon terms similar, to those in the present case, it was held by the same learned judge that the conveyance was a post-nuptial settlement within the meaning of s. 192 of the Act. I see no distinction between that and the present case, and I must, accordingly, assume that when Denning J. made the consent order in the present case, he did so in the exercise of his power under s. 192 of the Act. The point is of some importance, in view of the argument addressed to me by counsel for the husband, because under s. 10 of the Matrimonial Causes Act, 1937, by which it is provided that proceedings under s. 192 of the Act of 1925 may be commenced at any time after the presentation of the petition, no order under that section can be made unless and until a decree nisi is pronounced, and no such order, save in so far as it relates to the preparation, execution or approval of a deed or instrument, and no settlement made in pursuance of any such order, can take effect unless and until the decree is made absolute. Here, of course, the order was made at the time of pronouncing the decree nisi—i.e., the earliest moment at which it could have been made—and the decree has since been made absolute.

What is said for the wife is that the agreement between the parties with regard to the occupation of this house is none the less an agreement for being embodied in an order of the court. In effect it is argued that a consent order is an agreement, so as to fall within s. 1, sub-s. 1, of the Settled Land Act. In support of this proposition two cases were cited. The first of

(1) (1945) 114 L. J. (P.) 30.

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these, *Lievesley* v. *Gilmore* (1), is not, I think, of much assistance. In that case a consent order was made referring all matters in dispute to arbitration; subsequently, a further agreement was endorsed by the parties on the order empowering the arbitrator to order what the parties should do to prevent a repetition of the injuries complained of. The arbitrator made certain orders and, the defendant having failed to comply with them, the plaintiff brought an action for the non-performance of the award. It was held that the action would lie, as there was good evidence of an agreement that the arbitrator should have power to order what the parties should do. I think that counsel for the husband was well founded in distinguishing this case, on the ground that it arose out of an arbitration, which, unlike divorce, is essentially contractual in its nature—more particularly as the breach complained of was breach of an agreement subsequently and freely endorsed by the parties on the judge's order. The other case cited was *Worthington & Co.* v. *Abbott* (2), which arose out of a dispute between several mortgagees of a property. In the course of the proceedings a consent order had been made upon a summons, and it was argued that, properly construed, such an order was, in effect, an agreement embodying terms to and in which all the parties to the action subscribed and concurred. With regard to this argument, Eve J., who heard the case, said: "I am inclined to think that is the true construction "to be placed on a consent order, and that, when the parties to "an action agree an order purporting to be a consent order "throughout, they are, in effect, putting their hands to an "agreement which must be treated as embodying terms to "which all assent and by which all are bound." (3)

I should certainly hesitate long before differing from such an expression of opinion. But it is argued by counsel for the husband that, although this may be a correct statement of the effect of a consent order in any other Division of the Court, totally different considerations apply in this Division to a petition for divorce. The parties to a divorce suit are not free, as in other suits, to settle their disputes by agreement, and just as an agreement for a divorce would be void, so also an agreement during the pendency of a divorce suit, with regard to maintenance or variation of a settlement would, to say the least, taint the transaction with suspicion of collusion, and should be avoided. See, for instance, *Carmichael* v. *Car-*

(1) (1866) L. R. 1 C. P. 570.
(2) [1910] 1 Ch. 588.
(3) Ibid. 594.

michael (1). It seems clear that any such agreement, entered into during the pendency of the suit, would not be such as either party could sue on. Up to the time of decree nisi, at any rate, there could be no binding agreement; there could be no more than an agreed proposal for the judge's approval—a proposal which would be of no effect without such approval, and one which the judge would be free to sanction, or not, as he thought fit. It was, accordingly, submitted on behalf of the husband that in this case there was no agreement, but that the order of Denning J. must be treated as an order of the court pure and simple, the fact that it was made by consent being wholly irrelevant. I find this argument attractive, but, in my judgment, wholly fallacious. I am not informed how precisely the consent order in this case came to be made and embodied in the decree nisi—whether there had been prior consultation between the parties resulting in the submission to the judge of a proposed consent order, or whether they put their heads together after the pronouncing of the decree nisi and, by a process of mutual concession, arrived at an order to which both were prepared to consent. I must, however, assume that Denning J. was not unmindful of the duty laid on the court by s. 178, sub-s. 1, of the Jucicature (Consolidation) Act, 1925, as amended by s. 4 of the Matrimonial Causes Act, 1937, and that before pronouncing a decree nisi he satisfied himself that no collusion existed between the parties. Let it be that during the pendency of the suit it was not competent for the parties to enter into a binding agreement with regard to variation of the post-nuptial settlement. Equally, as I have pointed out, it was not competent for the court to make an order with regard thereto until the decree nisi was pronounced. But once the decree was pronounced, the court had power to make the order —though, of course, it would not become operative until the decree was made absolute—and once the court had power to make the order, I do not see why it was not open to the parties to agree what order should be made, subject, of course, to the approval of the court. Here the court did approve of what the parties agreed, and made an order accordingly. At that stage of the suit it seems to me that the parties were in the same position as parties to any other kind of action in any Division of the Court; i.e., if they chose to agree an order with regard to variation of the settlement, which only required the judge's approval to make it binding, they were, in the words of

(1) (1925) 42 T. L. R. 133.

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Eve J., " in effect putting their hands to an agreement which " must be treated as embodying terms to which all assent " and by which all are bound " (1).

For these reasons, my conclusion is that the order of Denning J. must be treated as evidence of a binding agreement between the parties, and, therefore, as being within the terms of s. 1, sub-s. 1, of the Settled Land Act, 1925. This conclusion renders it unnecessary for me to express any opinion on the further question, whether the order of Denning J., if not an agreement, should at least be held to be an " other instrument " within the meaning of the section. It follows from what I have already said that, in my judgment, the effect of the agreement was to constitute the wife a life tenant of the house under the Settled Land Act. In these circumstances it appears to me that the wife is entitled to an order approving the draft deeds submitted on her behalf.

Solicitors: *Amphlett & Co.; W. J. Pitman & Sons, for Charles C. Ladds, Birmingham.*

(1) [1910] 1 Ch. 588, 594.

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May 23.

Somervell and Cohen L.JJ. and Lynskey J.

J. *v.* J.

Husband and wife—Nullity—Operation rendering husband sterile before marriage—Incapacity—Wilful refusal—Effect of wife's knowledge before marriage—" Sincerity."

Where a husband has before marriage undergone an operation in consequence of which, while he remains capable of penetration and emission, the male sperm cannot leave his body, so that sexual intercourse with his wife cannot result in her conceiving a child, he has rendered himself incapable of consummating the marriage by reason of structural defect in his organs of generation.

Quære, however, whether such conduct constitutes wilful refusal to consummate the marriage.

Cowen v. *Cowen* [1946] P. 36 extended.

The fact that a petitioner for annulment of marriage had knowledge before the marriage of the impotence of his or her spouse is not an absolute bar to the granting of a decree.

Nash v. *Nash* [1940] P. 60 approved.

A husband had promised his wife before their marriage to renounce his intention of submitting himself to an operation the result of which, though he would remain capable of sexual intercourse to the extent of penetration and emission, would be to

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

render him sterile. Six weeks before the marriage the wife learnt that, in breach of that promise, the husband had undergone the operation. For the first two or three years of the marriage intercourse took place regularly. The marriage then became unhappy through the impossibility of having children, which the wife desired. She did not become aware that she might have grounds for annulment of the marriage until eleven years after the ceremony. As soon as she acquired that knowledge, she left her husband and instituted proceedings for nullity :—

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Held, that, as the wife had reasonably felt, when she came to know of the operation, that it was too late to withdraw from her engagement to marry, her petition for nullity, which was otherwise well founded, should not be held to fail for want of sincerity on her part.

G. v. *M.* (1885) 10 App. Cas. 171 applied.

Decision of Jones J. reversed.

APPEAL from Jones J.

The facts were stated substantially in the following terms in the judgment. The appellant wife, in an undefended petition for annulment of her marriage, alleged that the marriage had never been consummated and that the non-consummation was due to either incapacity or a wilful refusal to consummate on the part of her husband. The parties were married on June 16, 1934. Just before the marriage the husband underwent an operation which, while leaving him able to achieve penetration and emission, made it impossible for sexual intercourse to result in the conception of a child. He told the doctor who performed the operation that he was about to be married and that there was insanity in his future wife's family. The latter statement was untrue.

The doctor who performed the operation required a statement to be signed by the wife as well as by the husband setting out their understanding of the effect of the operation. This form was presented by the husband to his future wife on April 30, 1934. They had, at this date, been engaged to be married for some months. She refused to sign it, as she wished to have children. After an argument, she said that she would sign the form if the husband would promise that he would wait and not have the operation until after the marriage. She hoped that she would be able to persuade him to take a different view after the marriage. He so promised, but, in fact, underwent the operation. This came to her knowledge on May 6, some six weeks before the marriage.

Intercourse took place regularly for the first two or three

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years of the marriage, thereafter rarely. The marriage became increasingly unhappy. Before the marriage, when the fact of the operation became known to the wife, the husband had said that she could adopt children. When she suggested this later, he would have nothing to do with the suggestion. She did not know that she had or might have grounds for nullity until late in 1945. She then left her husband and began these proceedings. She said that she had had no material or other benefits from the marriage.

Jones J. held that the husband was guilty of wilful refusal to consummate the marriage, but dismissed her petition on the ground that it would be contrary to public policy to grant it in view of the wife's knowledge of the facts before marriage.

The wife appealed.

O'Sullivan K.C. and *R. J. A. Temple* for the wife. It is submitted that the husband, by undergoing this operation, rendered himself incapable of consummating the marriage. Alternatively, the facts support an allegation that he has wilfully refused to consummate it. In *Cowen* v. *Cowen* (1) it was held that a husband's insistence on the use of a contraceptive, which barred transmission of the male seed, constituted wilful refusal to consummate the marriage. There is no difference in principle between the application of an external contraceptive as in *Cowen* v. *Cowen* (1) and the achieving of the same result by means of an operation as in this case. The only distinction in fact is that in the one case the contraception is occasional whereas in the other it is permanent. [Somervell L.J. We find difficulty in accepting the argument based on wilful refusal in a case like this, where the intermittent occurrence as in *Cowen* v. *Cowen* (1) is made permanent by operation.] The husband is, however, none the less incapable of consummating the marriage because, the marriage not being naturally sterile, he has himself made it so by artificial means.

There remains the question whether such knowledge of the facts as the wife had is an absolute bar to her petition. It is submitted not. It is contrary to public policy, in the first place, that a person should be deprived of the power of generation. It is equally contrary to public policy that a person capable of generation should be tied to a person permanently incapable of it. It was laid down in *R.* v. *Donovan* (2) that it is a criminal offence to do bodily harm to

(1) [1946] P. 36. (2) [1934] 2 K. B. 498, 507–9.

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a person, and that the consent of the victim is irrelevant on that point. An operation of the kind performed on this husband is so contrary to public policy that it is a crime, and his consent to the operation is, for that purpose, irrelevant. On the other hand, no operation can be contrary to law which is performed for the purpose of achieving a greater good. In Shelford's Marriage and Divorce, it is stated (at p. 201): "Marriage "having been ordained for the procreation of children, a "capacity of consummation is implied in the marriage contract; "and is so far one of the essential duties for which the parties "stipulate, that the incapacity of either party to satisfy that "duty affords a ground for nullifying the contract."

All these considerations show that it cannot by itself be a bar to a petition for annulment of marriage that the petitioner knew beforehand of the other spouse's incapacity. Such knowledge, that is, cannot be taken as ipso facto proving insincerity on the part of the complaining wife. [Speech of Lord Bramwell in *G.* v. *M.* (1) and *L.* v. *L.* (2) referred to.] History shows that from as early as the fifteenth century prior knowledge of the complaining spouse of the other spouse's impotence is irrelevant and no bar to proceedings for nullity: see Esmein, Le Mariage en Droit Canonique, at p. 268, and Sanchez' de Matrimonio (Lyons Edition, 1654), vol. 2, p. 376. At p. 288 of Esmein's work can be seen the origin of the doctrine of insincerity, and what is there said coincides with the views of Lord Bramwell upon it and of Langton J. in *Nash* v. *Nash* (3).

The final question remains whether the lapse of time between knowledge and complaint should be held to defeat the petition, assuming knowledge itself to be irrelevant. It is submitted that mere lapse of time can never by itself operate as a bar. All that it can do is to load the dice against the complainant as tending to show insincerity. Langton J. said in *Nash* v. *Nash* (4) that the sincerity with which the court was concerned had reference only to the sincerity of the plea, and had nothing to do with the general character of the petitioner as a sincere or an insincere person or with her conduct before her marriage or her motives in entering into it. [Somervell L.J. Is not the test whether the petitioner is injured by the non-consummation

(1) (1885) 10 App. Cas. 171, 201, 202.
(2) 1931 S. C. 477.
(3) [1940] P. 60.
(4) Ibid. 64.

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of the marriage—whether it is a real claim ?] That may well be the test. If so, it is satisfied here.

The position, it is submitted, is : (1.) A marriage is rendered a nullity by the impotence or incapacity of one party ; (2.) mere lapse of time in claiming relief may be a material factor where the facts are doubtful, but is no absolute bar to the claim. [Rayden on Divorce (4th ed., p. 138) referred to.] (3.) Acquiescence in the impotence only counts against a petitioner from the time when he or she comes to a knowledge of the facts and the law governing the situation. It is made clear in *G.* v. *M.* (1) that it is actual knowledge alone of the facts that counts. It must not be presumed here that the wife knew her legal rights from the beginning. It was in making that presumption that the judge, it is submitted, was wrong. [The argument, and the speech of Lord Selborne, in *G.* v. *M.* (2) referred to.] The basis of all the speeches in that case is that the wife's knowledge before marriage of her husband's impotence is not in law an absolute bar to her petition, but merely a matter to be weighed in considering its merits.

Cur. adv. vult.

May 23. SOMERVELL L.J. [reading the judgment of the court, stated the facts, and continued :] In *Cowen* v. *Cowen* (3) this court decided that a husband had wilfully refused to consummate a marriage where he insisted on using a contraceptive when intercourse took place. In other words, a marriage is not consummated if a husband, by his own act, prevents " intercourse " from having its natural consequence in " the passage of the male seed into the body of " the woman " (4). The husband in the present case effected by the operation the same result as could have been effected by the use of a contraceptive on each successive occasion. There is no question of natural sterility. Applying *Cowen* v. *Cowen* (3), it seems to us, that by his act in having the operation, he rendered himself incapable of effecting consummation by reason of a structural defect which he had himself brought about in his organs of generation.

This, however, does not dispose of the case. The question is whether this knowledge of the wife is in law an absolute bar to her petition. It is clearly of great importance,

(1) 10 App. Cas. 171.
(2) Ibid. 178, 186.
(3) [1946] P. 36.
(4) Ibid. 40.

as Langton J. said in *Nash* v. *Nash* (1), as shedding light upon the issue of "sincerity." Langton J. in the case cited expressed the view obiter that the petitioner's knowledge of impotence before marriage is not an absolute bar in law.

Mr. O'Sullivan referred us to a passage in Esmein's Le Mariage en Droit Canonique (at p. 268), as showing that in mediæval canon law knowledge of impotence before marriage was not a bar to subsequent proceedings for nullity on the ground of impotence. A passage to the same effect is to be found in Sanchez' De Matrimonio (Lyons Edition, 1654) vol. 2, p. 376.

In *G.* v. *M.* (2) Lord Selborne L.C. stated that on this general subject the law of Scotland differed from the law of England. We were, however, quite rightly referred by Mr. O'Sullivan to *L.* v. *L.* (3). On the point under consideration the court was divided: the Lord President regarded knowledge before marriage as a bar; Lord Morison held that it was no bar; and Lord Blackburn reserved the point, though inclined to Lord Morison's view. We have come to the conclusion that the opinion expressed by Langton J. to which we have referred is a correct statement of the law.

The next question is whether the petition should be dismissed in all the circumstances, including the wife's knowledge, for lack of what is called "sincerity." Mr. O'Sullivan submitted, first, that mere lapse of time is not, by itself, a bar, though, of course, a material circumstance in considering "sincerity"—this is in accordance with what was stated by Lord Selborne L.C. in *G.* v. *M.* (4); secondly, that the material date is when the petitioner not only knows the facts but is aware of his or her legal rights. This is, again, in accordance with what was stated by Lord Selborne (5) and by Langton J. in *Nash* v. *Nash* (6).

The opinions on this branch of the law of Lord Selborne L.C., Lord Watson and Lord Bramwell in *G.* v. *M* (2), although obiter, are the most authoritative guidance on this subject. We feel no difficulty with regard to the period after the marriage, as the wife sought to exercise her rights, or what might be her rights, as soon as she was aware of them.

The judge, in dismissing the petition, did so by reason of the wife's knowledge before marriage. He came to the conclusion

(1) [1940] P. 60.
(2) 10 App. Cas. 171.
(3) 1931 S. C. 477.
(4) 10 App. Cas. 171, 189.
(5) Ibid. 185.
(6) [1940] P. 69.

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that, in view of this, it was "inequitable and contrary to "public policy" that she should now be entitled to relief. The matter was not so fully argued before the judge as before us, and we have come to a different conclusion. It is important to note that this is not a case where the knowledge existed at the time of the engagement. The parties had been engaged for some time. It was sprung on the wife a few weeks before the date for the marriage. She had protested against the idea. The husband had previously made her swear to say nothing about this operation to anyone. In any case it would not have been an easy reason for her to give for breaking off her engagement. The natural inference from her evidence, we think, is that she felt that it was too late to draw back. We do not think that, in these and the other circumstances, and doing our best to apply the principles laid down by Lord Selborne L.C. and Lord Watson, this petition should fail for "insincerity."

We do not think that the question of wilful refusal to consummate the marriage arises.

In the result, the order of the judge will be set aside, and a decree nisi pronounced.

Appeal allowed.

Solicitors for the wife: *Preston, Lane-Claypon & O'Kelly, for R. M. Wood, Johnson & Sons, Birmingham.*

Considered. DE RENEVILLE *v.* DE RENEVILLE. [1948] P. 100

1946 *Nov.* 11. — 1947 *Feb.* 21; *May* 7. Barnard J.

ROBERT otherwise DE LA MARE *v.* ROBERT.

Nullity of marriage—Jurisdiction—Wife petitioner resident in England—Respondent domiciled and resident abroad—No protest to the jurisdiction—Law to be applied.

The court has jurisdiction to entertain a suit for nullity of marriage on the ground of wilful refusal to consummate the same when the petitioner is either domiciled or resident in this country at the time of the institution of her suit, although the respondent may be domiciled and resident abroad.

Wilful refusal to consummate a marriage is a defect in marriage, an error in the quality of the respondent; and the law applicable is, on the authority of *Berthiaume* v. *Dastous* [1930] A. C. 79, the lex loci celebrationis. But were such wilful refusal to be considered as something affecting the capacity of one of the parties to contract marriage, then on the authority of *Sottomayor* v. *de Barros* (1877) 3 P. D. 1, the lex domicilii would be applicable.

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Wife's undefended petition for nullity of marriage on the ground of her husband's wilful refusal to consummate the same. The parties were married in Guernsey in 1940. The relevant facts are fully set out in the judgment.

D. Tolstoy for the petitioner :—The court has jurisdiction, first, because the petitioner was resident in England at the initiation of the suit and, secondly, because the respondent is alleged in the petition to be resident in England and he does not object to the court's jurisdiction. As to the first ground, the ecclesiastical court exercised jurisdiction if the respondent was resident within its jurisdiction : Shelford, Law of Marriage and Divorce, 1841, p. 486 ; *White* v. *White* (1) extended the court's jurisdiction in nullity to the case where the petitioner was resident and domiciled in England, but as the ecclesiastical court looked to residence and not to domicile (*Niboyet* v. *Niboyet* (2), *Le Mesurier* v. *Le Mesurier* (3)), that case is in effect an authority for holding that the petitioner's residence is sufficient ; the petitioner was stationed in England and this amounts to residence : *Hutter* v. *Hutter* (4), *Mason* v. *Mason* (5).

As to the second ground, the ecclesiastical courts had jurisdiction whenever the citation alleged that the respondent was resident within the jurisdiction (whether he was in fact resident or not) and he did not appear to object to the court's jurisdiction : *Donegal* v. *Donegal* (6), *White* v. *White* (1), *Sim* v. *Sim* (7). The ecclesiastical courts would have had jurisdiction in this case and this court has the same jurisdiction : (The Supreme Court of Judicature (Consolidation) Act, 1925, ss. 21 and 32).

Wilful refusal to consummate the marriage is a ground for nullity both in England and in Guernsey where the parties are domiciled and where the marriage took place, provided the court has jurisdiction to hear the suit. It is immaterial whether it is the lex fori or the lex loci celebrationis or the lex domicilii which is applicable.

May 7. BARNARD J. : This case originally came before me on November 11, 1946, and, having heard the evidence, I was satisfied on the facts that the petitioner had established her

(1) [1937] P. 111.
(2) (1878) 4 P. D. 1.
(3) [1895] A. C. 517.
(4) [1944] P. 95.
(5) [1944] N. I. 134.
(6) (1821) 3 Phill. 597.
(7) [1944] P. 87.

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case that the marriage had not been consummated owing to the respondent's wilful refusal to consummate. But I adjourned the case for proof of the Guernsey marriage and for legal argument as to the court's jurisdiction to entertain the suit, and the case again came before me on February 21, 1947.

The petitioner, Yolande Helene Robert, otherwise de la Mare, on February 7, 1940, went through a ceremony of marriage with Nicholas John Auguste Robert at the Register Office, Saint Peter Port in the Isle of Guernsey, and I am now satisfied that this ceremony was in accordance with the law of Guernsey. The parties never lived together ; the respondent was serving in England in the Royal Air Force and later the petitioner came to England and joined the Auxiliary Territorial Service. I am satisfied that she had a bona fide residence in England from December, 1942, to February, 1946. She was therefore resident here when she presented her petition on October 9, 1945, praying that her marriage be pronounced null and void. But in February, 1946, she returned to her home in Guernsey. It was alleged in the petition that both the petitioner and respondent were domiciled in England, but no attempt was made to establish an English domicile and I am satisfied on the evidence before me that both the petitioner and the respondent were at all material times domiciled in the Isle of Guernsey. The notice to appear, at the end of the petition, is addressed to " No. 502019 Corporal " Nicholas John Auguste Robert of the Royal Air Force " Regiment at present stationed with the Home Forces." But at the time of the presentation of the petition, though unknown to the petitioner, the respondent had returned to his home in Guernsey and was served there with the petition on May 1, 1946. The respondent did not appear to the petition and the case was undefended.

Counsel on behalf of the petitioner argued that this court had jurisdiction to entertain this suit firstly, by reason of the fact that the petitioner was bona fide resident in this country at the time she instituted her proceedings, and secondly, by reason of the fact that the respondent had not objected to the jurisdiction of the court. The jurisdiction of the ecclesiastical courts was based on the residence of the parties and in suits for nullity this court follows the practice of the ecclesiastical courts. Their jurisdiction, however, seems to have depended upon the residence of the respondent being within the juris-

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diction of an ecclesiastical court in England, but Bucknill J. in *White orse. Bennett* v. *White* (1), following the decision in *Roberts* v. *Brennan* (2), extended this jurisdiction to include a case where the petitioner was domiciled and resident in England although the respondent was both domiciled and resident abroad. I respectfully agree with Bucknill J.'s decision. In the case now before me the petitioner was residing here at the time she filed her petition for nullity, she was subject to English law and to the best of her belief the respondent was still serving in England though in fact she was wrong as to this ; it seems to me that she was therefore entitled to know whether by English law she was married or not. Owing to the course of events she returned to Guernsey before the case came on for hearing, but I consider the material date to be the date on which she instituted the suit. Although in the case of *White orse. Bennett* v. *White* (1) the petitioner was both domiciled and resident in England I think it is clear from the authorities that either domicile or residence would found jurisdiction. I have come to the conclusion that the petitioner being resident here at the time of the institution of her suit, this court has jurisdiction to entertain it. Therefore, it is not necessary for me to deal with the second point raised by counsel.

Non-consummation of a marriage owing to the wilful refusal of the respondent to consummate the marriage was introduced as a new impediment to marriage by the Matrimonial Causes Act, 1937. A peculiar feature of this impediment consists of the voidability of the marriage being based on a post nuptial fact. Ought I, in these circumstances, to apply the lex fori, which is the English law, or the lex loci celebrationis, or the lex domicilii, both of which are, in the case before me, the law of Guernsey ? There is, however, evidence before me of a barrister-at-law, practising in the Royal Courts of Justice, Guernsey, to the effect that wilful refusal of a respondent to consummate the marriage is a ground for a decree of nullity of marriage, according to the law of Guernsey.

I have come to the conclusion that I ought to apply the lex loci celebrationis, for the following reasons. Wilful refusal to consummate a marriage, in order to be justified on principle as a ground for annulment and not dissolution, must be considered as a defect in marriage, an error in the quality of

(1) [1937] P. 111. (2) [1902] P. 143.

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the respondent. If this is right, then Viscount Dunedin, in delivering the judgment of the Privy Council in *Berthiaume* v. *Dastous* clearly states the law applicable to such a case, in the following words (1): "If there is one question better "settled than any other in international law, it is that as "regards marriage—putting aside the question of capacity— "locus regit actum. If a marriage is good by the laws of "the country where it is effected, it is good all the world over, "no matter whether the proceeding or ceremony which "constituted marriage according to the law of the place would "or would not constitute marriage in the country of the "domicile of one or other of the spouses. If the so called "marriage is no marriage in the place where it is celebrated, "there is no marriage anywhere, although the ceremony or "proceeding if conducted in the place of the parties' domicile "would be considered a good marriage."

If I were wrong, and wilful refusal to consummate a marriage was to be considered as something affecting the capacity of one of the parties to contract marriage, then I am bound by the decision of the Court of Appeal in *Sottomayor* v. *de Barros* (2) to apply the lex domicilii.

In the present case both the contracting parties were at the time of their marriage domiciled in Guernsey and their marriage was celebrated in Guernsey; therefore, applying the law of Guernsey the petitioner is entitled to the decree for which she asks.

Solicitor: *Seton Pollock, The Law Society, Services Divorce Department.*

(1) [1930] A. C. 79, 83. (2) (1877) 3 P. D. 1.

J. B. G.

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May 20, 22.

Jones J.

DE RENEVILLE OTHERWISE SHERIDAN *v.* DE RENEVILLE.

Nullity of marriage—Wilful refusal or incapacity to consummate the same—Jurisdiction—Residence only of wife petitioner—Respondent domiciled and resident abroad—Absence of special circumstances.

(1.) Though a marriage may be voidable, a wife's domicile remains that of her husband so long as the marriage subsists; and the court has no jurisdiction by virtue of her domicile of origin alone to hear a wife's petition for nullity of marriage.

(2.) Although the residence of the petitioner may be sufficient to give jurisdiction to the court in certain cases of nullity where the husband is domiciled and resident abroad, this jurisdiction depends upon there being either special circumstances, as in *White* v. *White* [1937] P. 111, or the absence of a protest to the jurisdiction, as in *Robert* v. *Robert*, ante p. 164.

ISSUE as to jurisdiction raised by the respondent husband to his wife's petition for nullity on the alternate grounds of wilful refusal to consummate the marriage or incapacity.

The parties were married in 1935 in Paris, the husband being a Frenchman domiciled and resident in France, the wife being domiciled and resident in England until the date of her marriage. Part of the married life was spent in French possessions overseas, in the course of the husband's official duties. In 1940 the wife returned to England where she had lived until the date of the petition. The husband had not visited her in this country. In 1946 the wife presented a petition for nullity on the ground that the marriage had not been consummated owing to the incapacity or to the wilful refusal of the husband so to do, and the husband entered an appearance under protest to the jurisdiction.

R. J. A. Temple for the respondent. The marriage sought to be impugned is alleged to be voidable. It subsists as a valid marriage until decree absolute. If the husband died now the wife would be his widow. The wife by her marriage has acquired the domicile of the husband, which is admitted to be French. The conception of a separate domicile during the subsistence of the marriage is unknown to the law—*Turner* v. *Thompson* (1); *Mitford* v. *Mitford and Von Kuhlmann* (2); *The Lord Advocate* v. *Jaffrey* (3); *Attorney-General for Alberta* v. *Cook* (4); *Salvesen or von Lorang* v. *Administrator of Austrian Property* (5). The full effects of domicile continue so long as the marriage subsists: *Herd* v. *Herd* (6). The only exceptions are statutory—The Matrimonial Causes Act, 1937, s. 13; the Matrimonial Causes (War Marriages) Act, 1944, which apply to both nullity and dissolution proceedings. Reliance on the form of the decree produces a fallacious argument; the distinction between void and voidable marriages is clear: *Fowke* v. *Fowke* (7); *Adams* v. *Adams* (8).

(1) (1888) 13 P. D. 37.
(2) [1923] P. 130.
(3) [1921] 1 A. C. 146.
(4) [1926] A. C. 444.
(5) [1927] A. C. 641.
(6) [1936] P. 205.
(7) [1938] Ch. 774.
(8) [1941] 1 K. B. 536.

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The court has a statutory duty to act according to the principles on which the ecclesiastical courts would have acted —the Matrimonial Causes Act, 1857, s. 22, the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 21 and 32. The jurisdiction of the ecclesiastical courts has been judicially commented upon—*Lindo* v. *Belisorio* (1); *Inverclyde* v. *Inverclyde* (2); *Hutter* v. *Hutter* (3). The residence of a wife petitioner within the jurisdiction cannot alone confer jurisdiction where there is an objection by the husband—*Yelverton* v. *Yelverton* (4). The residence of the husband is the important factor—*Niboyet* v. *Niboyet* (5), especially if he were the party proceeded against—*Sim* v. *Sim* (6). Previous cases are distinguishable. In *Easterbrook* v. *Easterbrook* (7) and *Hutter* v. *Hutter* (3) both parties were resident in the United Kingdom and the ceremony took place here. *Roberts* v. *Brennan* (8) was undefended and the evidence as to residence in available reports is not satisfactory—*Graham* v. *Graham* (9). In any event that marriage was bigamous. *White* v. *White* (10), was a case of bigamous marriage and the court accepted jurisdiction ex misericordia or ex necessitate in the absence of objection. It was an extension of the jurisdiction which cannot be supported by authority. In *Robert* v. *Robert* (11) it was regarded as having been an extension of the jurisdiction. In that case the husband was thought to be resident within the jurisdiction at the initiation of the suit and did not object. A mere residence of the parties here for six months some years previously cannot confer jurisdiction now. It is an admitted fact that the parties never had a matrimonial residence within the jurisdiction. Counsel also referred to Dicey's Conflict of Laws, 5th ed., r. 65 (i.) (I), r. 100, Cheshire's Private International Law, 2nd ed., pp. 193, 343, 346, 348.

S. E. Karminski K.C. (*Hon. Victor Russell* with him) for the petitioner. It is agreed that separation does not give a wife a separate domicile: *The Lord Advocate* v. *Jaffrey* (12); *Attorney-General for Alberta* v. *Cook* (13). Sed aliter when the marriage is void or voidable: *White* v. *White* (10); *Roberts* v. *Brennan* (8);

(1) (1795) 1 Hagg. Con. 216.
(2) [1931] P. 29.
(3) [1944] P. 95.
(4) (1859) 1 Sw. & Tr. 574.
(5) (1879) 4 P. D. 1.
(6) [1944] P. 87.
(7) [1944] P. 10.
(8) [1902] P. 143.
(9) [1923] P. 31.
(10) [1937] P. 111.
(11) Ante, p. 164.
(12) [1921] 1 A. C. 146, 158.
(13) [1926] A. C. 444.

Mehta v. *Mehta* (1). There is no distinction between void and voidable marriages when the petitioner's residence is established: *Hutter* v. *Hutter* (2), *Easterbrook* v. *Easterbrook* (3), and it issubmitted that there is no distinction quoad domicile either. *Turner* v. *Thompson* (4) is distinguishable, the wife being domiciled in England at the time of the American decree. The residence of the petitioner is sufficient: *Robert* v. *Robert* (5) and see Matrimonial Causes Act, 1857, s. 22, and Supreme Court of Judicature (Consolidation) Act, 1925, ss. 32, 103. The ecclesiastical courts had jurisdiction over English subjects, wherever the marriage was celebrated: *Harford* v. *Morris* (6).

Graham v. *Graham* (7) was wrongly decided and is inconsistent with *Roberts* v. *Brennan* (8). Objection to the jurisdiction is immaterial, for either the court has, or has not, jurisdiction, and the parties cannot confer jurisdiction in matrimonial suits by consent. The court should look only at whether it has jurisdiction; and a person resident in England is entitled to ask an English court whether or not he or she is married by English law: *Mitford* v. *Mitford* (9).

R. J. A. Temple in reply.

May 22. JONES J. In the suit in which this issue has been directed the petitioner is the wife, and she prays that the marriage be declared null and void on the ground that it has not been consummated owing to the incapacity or wilful refusal of the respondent to consummate it. The respondent entered a general appearance in July, 1946, which was amended to an appearance under protest to the jurisdiction on the ground that the court had no jurisdiction to entertain the petition. The respondent contends that the allegations of non-consummation by wilful refusal or incapacity, if established, would render the marriage voidable, but not void ab initio; that consequently the marriage still subsists, and that the petitioner's domicile is that of the respondent, who at all material times and now is domiciled in the Republic of France. On October 8, 1946, it was ordered that the issue be tried whether the court has jurisdiction to entertain this petition,

(1) (1945) 174 L. T. 63.
(2) [1944] P. 95.
(3) [1944] P. 10.
(4) (1888) 13 P. D. 37.
(5) Ante, p. 164.
(6) (1776) 2 Hagg. Ecc. 423, 425.
(7) [1923] P. 31.
(8) [1902] P. 143.
(9) [1923] P. 130, 135–7.

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and by her answer to the respondent's amended appearance the petitioner raises the points that I have to decide very clearly. She says first of all that " If the allegations either in " para. 7 or in para. 8 of the petition are established, the court " will declare the marriage had and solemnized between the " plaintiff and the defendant on the 1st day of August 1935 to " have been and to be absolutely null and void to all intents " and purposes in law whatsoever. The effect of the said " declaration will be that the defendant was never married " to the plaintiff and therefore never acquired the plaintiff's " domicile which was French, but retained her own domicile " which was and is English." Secondly, the petitioner says that she " admits that the plaintiff was at all material times " domiciled in France but contends that the domicile of the " husband is not an essential ingredient to found the jurisdiction " of this court," and further that she " has never at any time " lost but has retained and still retains her domicile of origin " in England and is and was at all material times resident in " England and this court has jurisdiction to entertain " her suit."

The following facts have been either proved or admitted. The husband is a Frenchman. His domicile has always been French, and he appears to have been resident for many years in the Republic of France. The petitioner was born in England of English parents, and lived in England until her marriage. The marriage was solemnized in Paris, at the mairie of the sixth arrondissement, and after the marriage the parties lived for six months in Paris, where the husband held a military appointment. After six months in Paris they went to the French Congo, where they lived for two years. In 1938 they returned to France for a few days, and then they spent a few months in England staying with friends or relations until September, 1938, when they returned to Paris, the husband having been recalled to military duty. They went then to Biskra, in Algeria, in the Republic of France, and they lived together there until the outbreak of war in 1939, when the wife returned to England, the husband remaining at Biskra. In April, 1940, she went to Biskra because her husband was seriously ill, and stayed there for six weeks. Then she returned to England, and she has lived in England ever since apart from the respondent. It is admitted therefore that the respondent has always been domiciled in France and has been resident there except during the months he was in England in 1938;

that he was resident in the Republic of France when the petition was presented, and apparently that he is resident there now.

I do not think that it can be disputed that the wife acquired the domicile of her husband by her marriage to him. There is considerable authority that that must be so. I refer only to a passage in the judgment of Hannen P. in *Turner* v. *Thompson* (1) : „" A woman when she marries a man, not only " by construction of law, but absolutely as a matter of fact, " does acquire the domicile of her husband if she lives with " him in the country of his domicile," which was cited with approval by Viscount Dunedin in the case of *Salvesen or von Lorang* v. *Administrator of Austrian Property* (2) : and there is no doubt that this lady did prima facie acquire the domicile of her husband at the time of her marriage. In view of the facts that she married the respondent in Paris and lived with him there, and afterwards lived with him in other parts of the Republic of France, I hold that she did in fact acquire his domicile.

If a decree of nullity on the ground of the husband's incapacity is pronounced in this case the marriage would be declared always to have been null and void, and for that *Newbould* v. *Attorney-General* (3) is an authority. This is a voidable marriage, and there is some doubt whether for this purpose there is a distinction between a void and a voidable marriage. The authorities to which Mr. Temple has referred me to-day, *Fowke* v. *Fowke* (4) and *Adams* v. *Adams* (5), appear to indicate that there is a considerable difference between a void and a voidable marriage. Farwell J. in *Fowke* v. *Fowke* (6) says: " The difference in such a case " from that of persons who are married but whose marriage " has never been consummated owing to the physical disability " of one of the parties is plain. In the case of such persons " their position is that of man and wife in this sense : that " no one can be heard to say that they are not legally married. " To allege of two such persons, before any decree of nullity " has been made, that they were living in sin, would, I " apprehend, be slanderous and might give rise to a cause of " action for damages by one or other of the parties or both of

(1) (1888) 13 P. D. 37, 41.
(2) [1927] A. C. 641, 663.
(3) [1931] P. 75.
(4) [1938] Ch. 774.
(5) [1941] 1 K. B. 536.
(6) [1938] Ch. 774, 780.

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" them. Moreover, their position is that of man and wife from " all practical points of view. The husband, for instance, is " bound to maintain the wife, and the wife, if she is not " maintained, is entitled to pledge his credit, and, if she " pledges his credit, and a tradesman then sues the husband, " it is not open to the husband in those proceedings to plead " that the lady was not his wife, nor would it be open to the " tradesman to set up that there never had been a valid " marriage. So long as neither the husband nor the wife have " taken proceedings in the Divorce Court and obtained a " decree of nullity, those two persons are to all intents and " purposes married people. But the moment a decree of " nullity is pronounced the position becomes wholly different " and there is then no marriage and never has been a " marriage " ; and Scott L.J. in *Adams* v. *Adams* (1) says this : " Before discussing the interpretation of the separation " agreement, upon which, in my opinion, the appeal really " turns, it is desirable to clear the ground on two points. " In the first place, no impossibility supervened, either in fact " or in law, to prevent performance by the appellant of his " promise to pay the respondent 1*l.* a week. If he was by the " decree relieved of that obligation, it was on some other " ground. In the second place, until the decree absolute, the " status of husband and wife continued to attach to the " appellant and respondent : and although from the time " when he first discovered her incapacity to consummate, he " possessed a legal right to have the marriage annulled, it " remained in law an effective marriage until he obtained his " decree. Some confusion has been caused in legal discussion " upon the difference between a decree of nullity and a decree " of divorce, in regard to their retrospective effects upon the " pre-existing marriage, by the use of the words ' void ' and " ' voidable.' It has been said that in the case of divorce it is " good law to speak of the marriage as having been voidable, " but not so in the case of nullity ; for there the decree " pronounces the marriage to have been ' void ' from the " outset. Primarily, the use of those two words in a metaphor " from the law of contract, and is not truly appropriate to the " law of status. But the use of both terms in connexion with " the status of marriage has received judicial sanction, and is " consonant with the ordinary English meaning of the words, " although it lends itself to misuse, and may cause confusion."

(1) [1941] 1 K. B. 536, 541.

And Goddard L.J. says (1): "The decree was granted by "reason of the incapacity of the wife to consummate the "marriage; and it was, therefore, a case of what has always "been described as a voidable and not of a void marriage. "Such a marriage is good and valid unless and until the "assistance of the court is sought; or, as would have been "said before 1857, the office of the judge had been promoted, "and a decree obtained. A sentence or decree always has been, "and is, as necessary to annul a marriage on this ground as to "dissolve it for adultery or cruelty. Until decree the parties "have the status of married people, with all the rights and "liabilities consequent thereon."

It appears to me that there is very clear authority for a distinction for this purpose between marriages which are void and marriages which are voidable; but Mr. Karminski argues that, although this marriage has not yet been declared void, it really is non-existent, because it may at some future time, if these proceedings are successful, be declared to be a void marriage. I am not convinced by that argument. It appears to me that there must be a distinction between a void and a voidable marriage. At the present moment this marriage is a subsisting marriage. If it were a bigamous marriage, no doubt it might be said that it is already void, but as it is a marriage which is perfectly good until there is a decree saying it is to be voided on the ground of the incapacity which is alleged in the petition, it seems to me that at the present moment it is a subsisting marriage and that I ought to treat it as such.

Two further cases have been referred to by Mr. Temple, though I think not by Mr. Karminski, which I should mention, namely, *Stathatos* v. *Stathatos* (2) and *de Montaigu* v. *de Montaigu* (3). They are cases in which it was held that the wife was entitled to bring proceedings for dissolution of marriage in this country although the husband was domiciled abroad; but they were cases in which the wife had been placed in an intolerable situation, as one of the judges said, by the husband obtaining a decree of nullity in the courts of his foreign domicile, and the ground on which jurisdiction was assumed by the court in each of those cases was that the wife was in that intolerable position, and because it was right

(1) [1941] 1 K. B. 536, 547.
(2) [1913] P. 46.
(3) [1913] P. 154.

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that the court should assume jurisdiction and treat her as having a domicile of her own sufficient to support a suit for dissolution of the marriage.

I come to the conclusion therefore that the petitioner has failed to establish that she has a domicile other than that of her husband; that she acquired the domicile of her husband by the marriage, that she has never lost it, and that at the present time she is not domiciled within the jurisdiction of this court.

The other contention on which the petitioner relies is that when the petition was presented she was resident here, that she is still resident here, and that therefore the court has jurisdiction to entertain the petition. It appears to be established that in suits for nullity this court follows the practice of the ecclesiastical courts, and that the jurisdiction of the ecclesiastical courts in such suits was based on the residence of the parties, though it may be based also on domicile. Until the decision in *White* v. *White* (1) it appears to have been considered that it was essential to the jurisdiction that both parties should be resident within the jurisdiction of the court; but in that case Bucknill J., as he then was, held that the wife never acquired the domicile of the husband and that the court had jurisdiction, although the respondent husband was apparently in Australia. That decision has been followed by Barnard J. in the very recent case of *Robert* v. *Robert* (2). Bucknill J. followed the decision of Jeune P. in *Roberts* v. *Brennan* (3). The headnote to that report reads: "Matrimonial residence within the jurisdiction is sufficient "to give the court power to declare a bigamous marriage "null and void, even though the domicile of the respondent "be Irish and the de facto marriage celebrated in the Isle of "Man;" and in his judgment Sir Francis Jeune says (4): "Although *Niboyet* v. *Niboyet* (5) is now a discredited authority "as applied to suits for dissolution of marriage, the judgment "in that case in the Court of Appeal still applies in such a case "as this. In my view, residence—not domicile—is the test "of jurisdiction in a nullity case. The jurisdiction of the "ecclesiastical courts was based on the residence of the "parties, and in suits for nullity this court follows the practice "of the ecclesiastical courts, as prescribed by s. 22 of the

(1) [1937] P. 111.
(2) Ante, p. 164.
(3) [1902] P. 143.
(4) Ibid. 144.
(5) (1878) 4 P. D. 1.

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" Matrimonial Causes Act, 1857 " (1) and he pronounced a decree nisi.

In *Graham* v. *Graham* (2), Horridge J. expressed great doubt whether the report of *Roberts* v. *Brennan* (3) could be correct. He said (4) : " I was very much pressed on behalf of the " petitioner with the case of *Roberts* v. *Brennan* (3), in which " Jeune P. stated that in his view residence and not domicile " was the test of jurisdiction in a nullity case, because it was " said in that case on the report there was no evidence " of either party having been resident within the jurisdiction ; " but on production of the original citation which I sent for " it appears that the wife had given an address within the " jurisdiction. The report in this case is not to my mind " satisfactory as to the evidence of residence before the court, " and I cannot think I ought to rely on it if it is inconsistent " with the authorities I have already referred to." Mr. Karminski to-day referred me to the report in The Times Law Reports of *Roberts* v. *Brennan* (5), where the headnote reads : " The court has jurisdiction to grant a decree of nullity " where the matrimonial residence is within the jurisdiction, " though the domicile is not." The report of the judgment in this report is as follows : " The President said that although the " judgment of the Court of Appeal in *Niboyet* v. *Niboyet* (6) " had been practically overruled and held to be wrong as " applicable to suits for dissolution (vide *Le Mesurier* v. *Le* " *Mesurier* (7)), yet the reasoning in that case would still " apply to suits for nullity of marriage. In his opinion, in " cases of nullity the doctrine of domicile did not apply, but " that of residence did. It seemed clear that a case such " as the present one could have been brought before the " ecclesiastical courts, as their jurisdiction would have " depended upon the matrimonial residence of the parties

(1) The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22 : " In all suits and proceedings other than proceedings " to dissolve any marriage, the " said court shall proceed and " act and give relief on principles " and rules which in the " opinion of the said court shall " be as nearly as may be conformable to the principles and " rules on which the ecclesiastical courts have heretofore " acted and given relief, but " subject to the provisions " herein contained and to the " rules and orders under this " Act."

(2) [1923] P. 31.

(3) [1902] P. 143.

(4) [1923] P. 37.

(5) (1902) 18 T. L. R. 467.

(6) 4 P. D. 1.

(7) [1895] A. C. 517.

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" and that being so this court also would have jurisdiction " to entertain it." It does not appear to me to be clear from that report that the petitioner only was resident within the jurisdiction. The learned President refers, according to one report, to matrimonial residence—in fact according to both reports, and he says that residence, not domicile, is the test of jurisdiction. But it does not appear to be clear, though it may be the fact, that he was deciding that the residence of one party—that is, the petitioner only—was enough to give the court jurisdiction. Bucknill J. followed that case in *White* v. *White* (1) and decided that residence of one party was enough—that the residence of the petitioner was enough.

There are many points of distinction, I think, between the case of *White* v. *White* (1) and the present case. *White* v. *White* (1) is a case to which very careful attention must be given. The head note is as follows: " On a petition by a " woman for nullity of a form of marriage contracted in " a foreign country on the ground of the bigamy of the man, " the domicile of the man is not an essential ingredient to " found jurisdiction. A woman, petitioner for nullity, went " through a form of marriage abroad with a man whose wife " was living, and two days later left the place of the marriage " without consummation. The petitioner was domiciled and " resident in England ; the man, the respondent, was domiciled " either in Malta, his domicile of origin, or Australia, his " domicile of choice, and had never resided here. The man " was served with notice to appear. He acknowledged service, " but did not enter appearance. He also signed a written " admission that when he went through the form of marriage " with the petitioner he was a married man :—*Held*, that the " woman never acquired the domicile of the man and that in " the circumstances of the case the court had jurisdiction and " the woman was entitled to a decree nisi of nullity. *Quære* " whether the court would have had jurisdiction if the man " had entered appearance under protest." In his judgment Bucknill J. said this (2): " Though a defendant may usually " reside out of the jurisdiction, yet if he is served with a " citation within the jurisdiction of an ecclesiastical court in " England in a suit for nullity of marriage, that court has " jurisdiction to try the validity of the marriage wherever it " may have been contracted. *Roberts* v. *Brennan* (3) decided

(1) [1937] P. 111.
(2) Ibid. 124.
(3) [1902] P. 143.

"that in a case such as the present it is not the husband's "so-called domicile which is an essential ingredient to found "jurisdiction, and that residence within the jurisdiction of the "parties at any time since the marriage is sufficient. The "present case, however, goes one step further, so far as the "respondent is concerned. On the other hand, it is in one "respect a stronger case, in that the petitioner is domiciled "and resident here. If, as in this case, the respondent has "never resided in England, but the petitioner is domiciled "and resident here, is it necessary for her to proceed to what-"ever part of the world the respondent may happen to reside "in, in order to get her status established by a decree of "nullity? This would impose a heavy burden indeed on the "petitioner, for the respondent may move about from place "to place and have no fixed residence. Counsel on behalf "of the King's Proctor argued that in a case of nullity such "as this, jurisdiction must be based on the residence or domicile "of the respondent within the jurisdiction. He also argued "that the decree asked for in this case was not merely "declaratory, but that the statutory jurisdiction of the court "was invoked and that certain consequences might flow from "such a decree (although not in fact asked for in this case) "such as custody of children, orders for maintenance or "variation of settlements. He further argued that there was "a general principle that this court would not exercise "jurisdiction in a case where the respondent has not subjected "himself to the jurisdiction by residence or domicile or by "submission to it. I appreciate the weight of these arguments, "and if the respondent had entered an appearance to the "petition under protest against the exercise of jurisdiction, "I should have had serious doubts whether this court has "jurisdiction over the matter. But I do not think I have to "decide that question in this case. In my view, the respondent, "by his conduct and his admissions, has so acted as to "justify the court in exercising jurisdiction. He has not in "terms submitted to the jurisdiction, but he has, I think, "made it clear that he has no objection to its exercise. In "my view, under the special circumstances of this case, the "court has jurisdiction to make the decree sought by the "petitioner."

There are many points of difference, as I have said, between that case and the present case, and one of the most important points is that in that case the respondent had not entered an

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appearance. Mr. Karminski observed that he was not able quite to appreciate the learned judge's view that that was a matter of importance; but the learned judge said that if the respondent had entered an appearance against the petition under protest against the jurisdiction he would have a very serious doubt whether or not the case came within the jurisdiction of the court. However, in that case the respondent lived with the wife only two days after the marriage, and the husband was already married at the time of the marriage, and her petition for nullity was based on the ground that he was married at the time when she went through a form of marriage with him. It appears to me that Bucknill J. came to the conclusion that those circumstances amounted to special circumstances which, in his view, justified the court in exercising jurisdiction. In my view the present case can be distinguished from *White* v. *White* (1), as none of those special circumstances exist in this case. Here the story is a simple one, that of a marriage in the French Republic, the parties living together in the French Republic, the husband being domiciled there and always having lived there except for a few months in 1938. They lived there except for those few months until 1939 when on the outbreak of war the wife came to this country. There are no special circumstances of hardship in this case such as existed in *White* v. *White* (1). In *Robert* v. *Robert* (2) Barnard J. held that the fact that the petitioner was resident within the jurisdiction at the time of her suit gave the court jurisdiction to entertain it, although both parties were domiciled in Guernsey, and the respondent was resident there. In that case there was no protest to the jurisdiction, and I have not been referred to any case in which there has been a protest to the jurisdiction, and in which it has been decided that the court has jurisdiction to entertain a suit of nullity where the respondent was domiciled and resident abroad and the petitioner was domiciled abroad although resident within the jurisdiction.

I have been referred to the case of *Hutter* v. *Hutter* (3), which also was a case of hardship. The parties to that suit were resident within the jurisdiction, and I think that the respondent was also domiciled within the jurisdiction; and in *Easterbrook* v. *Easterbrook* (4), the respondent was domiciled and resident in England. The difficulty about the present

(1) [1937] P. 111.
(2) Ante, p. 164.
(3) [1944] P. 95.
(4) [1944] P. 10.

case is that the respondent is both domiciled and resident in France. The French court can pronounce a decree of nullity that would be binding here. Consequently there would not appear to be any special circumstances such as there were in *White* v. *White* (1), and it does not appear to me that the authorities which have been cited to me establish that the court has accepted jurisdiction when the respondent was both resident and domiciled out of the jurisdiction, and where there is no case of hardship, or any special circumstances such as there were in *White* v. *White* (1). For those reasons I have come to the conclusion that the petitioner has failed to make out the contentions set out in her answer to the respondent's amended appearance, and I hold that this court has no jurisdiction to entertain this suit.

Judgment for the plaintiff in the issue: no order as to costs.
Leave to appeal.

Solicitors: *Peacock & Goddard for the plaintiff husband; Charles Russell & Co. for the defendant wife.*

(1) [1937] P. 111.

J. B. G.

END OF VOL. AND OF PROBATE SERIES FOR 1947.

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